SIGNIFICANT MISSOURI LAW DISTINCTIONS

Table of Contents

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ADMINISTRATIVE LAW

I. MISSOURI ADMINISTRATIVE PROCEDURE ACT – Chapter 536

A. Applicability to State Agencies (exclusions)

1. MAPA is generally applicable to Missouri state agencies (e.g. Department of Social Services, Gaming Commission, etc.).

2. A few specialized agencies, such as the Workers' Compensation Commission, are exempt from MAPA because they are already covered by detailed procedures.

B. Applicability to Local Government Agencies

1. MAPA may also apply to local government agencies, including those that derive their authority from a city, county, or other local government (e.g. city police department, school board, etc.).

C. "Agency"

1. MAPA defines an agency as any administrative officer or body [with the authority to] make rules or adjudicate contested cases (RSMo §536.010(2)).

2. MAPA excludes any traditional branch of government (e.g. courts, legislature, governor).

3. Under MAPA, an agency shall not include an institution of higher education, supported in whole or in part from state funds, if such institution has established written procedures to assure that constitutionally required due process safeguards exist and apply to a proceeding that would otherwise constitute a "contested case" as defined in section 536.010 (RSMo §536.018; *Suppes v. Curators of the University of Missouri*, 529 S.W.3d 825 (Mo. App. W.D. 2017)).

4. Administrative agencies, as products of the legislature, possess only those powers conferred by a Missouri statute.

5. Even though a statute unambiguously requires that an administrative agency "shall" meet a particular deadline or similar mandate, courts are not free to impose a sanction when the agency fails to comply with that obligation unless the legislature has approved that sanction and its use in such circumstances.

II. OBTAINING INFORMATION

A. Discovery Rules (RSMo §536.073(1), §536.077)

1. Agency subpoena power (RSMo §536.077)

   (a) Subpoena power for investigatory purposes is generally authorized by the agency's enabling statute.

2. Power to issue discovery rules (RSMo §536.073.2)

   (a) MAPA gives agencies created by the constitution or state statute power to issue rules permitting any form of discovery allowed in a civil action. See Civil Procedure Outline for rules related to discovery in civil actions.

   (b) An agency discovery order that: (i) requires a physical or mental examination; (ii) permits entrance upon land or inspection of property without permission of the owner; or (iii) purports to hold any person in contempt, may not be enforced except by order of the circuit court after notice and hearing.

B. Administrative Searches

1. Investigation must be authorized by law, which requires not only statutory authority, but also compliance with constitutional protections. All criminal law warrant exceptions are recognized as exceptions for administrative searches. A warrant is not required to search intensively regulated businesses.

C. Sunshine Law (RSMo §§610.010-610.225)

1. Public governmental body

   (a) It is the public policy of Missouri that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. The Sunshine Law is liberally construed to promote openness and exceptions are strictly construed (RSMo §610.011).

   (b) Public governmental body includes any legislative or administrative bodies of the state and its political subdivisions, along with all departments, divisions, and functional units of those governments, the governing boards of all state-funded colleges and universities, judicial entities when operating in an administrative capacity and committees under the direction of such entities (RSMo §610.010(4)).

   (c) It also includes quasi-public governmental bodies whose primary purpose is to carry out activities for governmental bodies or to perform certain public functions.

2. Open meetings (RSMo §610.021, §610.022.2)

   (a) Unless closure is specifically authorized, all meetings are required to be open to the public.

3. Notice of meetings (RSMo §610.020.2)

   (a) Any meeting at which any public business is discussed or decided must be subject to reasonable advance notice of the time, date, place, and tentative agenda.

4. Open records (RSMo §§610.021-610.024)

   (a) Any public records retained by a public governmental body are to be open to the public for inspection, unless the record is specifically exempt from disclosure.

   (b) Legislative records are public records and include all records, in whatever form or format, of the official acts of members of the general assembly, of individual legislators, their employees and staff, of the conduct of legislative business (Mo. Const. Art. III, §19(b), Amended November 6, 2018).

5. Closed meetings and records (RSMo §610.021)

   (a) The Sunshine Law contains a number of subject matter-based discretionary exceptions to its general rule of broad public access, which permit closure of applicable records and meetings.

III. ADMINISTRATIVE HEARING

A. Due Process

1. In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, have a full opportunity to be heard, and to defend, enforce and protect his or her rights.

B. Right to Hearing

1. Question of law: A circuit court must determine the type of administrative case before it because different standards of judicial review apply to contested and non-contested cases. The classification of a case as "contested" or "non-contested" is determined as a matter of law. The key to the classification of a case as contested or non-contested is the requirement of a hearing.

2. Contested case (RSMo §536.010(4))

   (a) A contested case is a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be

determined after a trial-type hearing. The law mandating the hearing may be a statute, procedural due process, or the agency's own rules.

(b) Procedural due process—a party is entitled to a hearing as a matter of constitutional due process when:

- The agency action will be based on disputed, material adjudicative facts, not legislative facts; or
- The action may adversely affect an individual's liberty or property interests (*Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Examples include:

- Driver's license revocation (*Bell v. Burson*, 402 U.S. 535 (1971)).
- Parole revocation (*Morrissey v. Brewer*, 408 U.S. 471 (1972)).
- Loss of teacher tenure (*Perry v. Sindermann*, 408 U.S. 593 (1972)).
- Suspension from public school (*Goss v. Lopez*, 419 U.S. 565 (1975)).
- Social security disability payment termination (*Mathews v. Eldridge*, 424 U.S. 319 (1976)).

(c) Trial-type hearing

The maximum hearing that due process may require. Much like a judicial trial without a jury, usually with notice, some discovery, right of counsel, oral hearing, confrontation, cross-examination, right to present evidence and make argument, impartial tribunal, decision on the record, written findings of fact and conclusions of law, and judicial review.

(d) Balancing test

In determining the constitutional requirements as to the nature and timing of a hearing, the courts generally balance three factors: (i) the private interest that will be affected by the official action; (ii) the risk of an erroneous deprivation of such interest through the procedures used; and (iii) the government's interest, including the fiscal and administrative burdens that a particular procedural requirement would entail.

3. Non-contested case

MAPA does not explicitly define a "non-contested case," courts have defined it as an agency decision that is not required by law to be determined after a hearing. *Furlong Cos., Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo. banc 2006).

C. Hearing Procedures

1. Commencing the contested case (RSMo §536.063(1))

   (a) Any individual or agency seeking agency action or an agency decision may institute a proceeding.

2. Notice (RSMo §536.067)

   (a) Parties and other interested persons are entitled to notice that a contested case has been commenced and notice of the hearing.

3. Presentation of evidence (RSMo §§536.070(2), (3))

   (a) Parties to administrative hearings have a right to present evidence orally, to cross-examine opposing witnesses, and to rebut evidence against them.

4. Presumption of agency decision as valid

   (a) Missouri courts presume that an administrative decision was valid and not the product of an improperly influenced administrative body. Any alleged bias or prejudice on the part of an administrative law judge, to be disqualifying, must stem from an extrajudicial source.

5. Agency findings of fact

   (a) In contested cases, the agency's findings of fact need to be sufficiently specific to enable the reviewing court to assess the agency's decision intelligently, and to ascertain whether the facts furnish a reasonable basis for the decision.

IV. JUDICIAL REVIEW

A. Review of Contested Case

1. To file in court for direct review of an agency's decision, the aggrieved party must file a petition in circuit court within 30 days after delivery of notice of the agency's final decision (RSMo §536.110).

2. Aggrieved party

   (a) A party is aggrieved when an administrative decision prejudicially affects his personal or property rights or interests.

3. Petition for review in circuit court

(a) Administrative Hearing Commission (AHC) Tax Decisions

A plaintiff must file a petition in the Court of Appeals or the Supreme Court within 30 days after mailing or delivery of a final decision (RSMo §621.189).

(b) Enforcement review

A party (most often the agency) may seek judicial review to enforce an agency order against a non-complying party.

4. Contested case

(a) A reviewing court must look to the whole record in reviewing an agency's decision, not merely at that evidence that supports its decision. A court does not view the evidence in the light most favorable to the agency's decision.

(b) When an agency decision is based upon the agency's interpretation and application of a law, an appellate court reviews the administrative agency's conclusions of law and its decision under the *de novo* standard of review.

B. Review of Non-Contested Case (RSMo § 536.150)

1. When an agency decision determining the legal rights, duties, or privileges of any person is not subject to agency review, the MAPA provides that the decision is reviewable by means of suit for injunction, certiorari, mandamus, prohibition, or any other appropriate action.

2. On review of an uncontested case under the MAPA, the circuit court does not review the record for competent and substantial evidence (there is no record to review) but instead conducts a *de novo* review in which it hears evidence on the merits, makes a record, determines the facts and decides whether the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion. *Lampley v. Missouri Commission on Human Rights*, 570 S.W.3d 16 (Mo. banc 2019).

C. Rulemaking

1. Judicial review of rules is available exclusively in the circuit court via an action for declaratory judgment on the validity of any rule or threatened application thereof (RSMo §536.050).

2. With some exclusions, agency decisions or statements of general applicability that implement, interpret, or prescribe law or policy, or that describe the organization, procedure, or practice requirements of any agency, are considered "rules," even if the agency did not follow the rulemaking procedures, and are

subject to judicial review under MAPA. RSMo §536.010(6); *Missouri Ass'n of Nurse Anesthetists, Inc. v. State Bd. Of Registration for Healing Arts*, 343 S.W.3d 348 (Mo. banc 2011).

D. Standing Issues

1. Missouri taxpayer standing

   (a) A Missouri taxpayer has standing to challenge allegedly illegal action when the agency action: (i) involves a direct expenditure of funds generated through taxation; (ii) results in an increased levy of taxes; or (iii) results in a pecuniary loss.

E. Exhaustion of Administrative Remedies

1. No one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted, unless an exception applies such as a constitutional challenge to the underlying statute or an agencies failure to commence the required procedures. *Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348 (Mo. banc 1995); RSMo §536.100.

F. Scope of Review

1. Constitutional review

   (a) For constitutional claims, the court will make its own independent determination of whether a constitutional right was affected, and will give no deference to the administrative agency.

2. Jurisdictional review

   (a) For jurisdictional challenges, the court will make its own independent determination regarding the statutory interpretation issue of agency power, and will give some deference to the administrative agency decision.

3. Procedural review

   (a) For procedural challenges, the court will make its own independent determination as to whether an agency has followed proper procedure in its decision making, and will give little or no deference to the agency decision.

4. Merits review

   (a) Contested case

   Findings of fact – When reviewing agency findings of fact, the court will use the competent and substantial evidence test, with deference to the

administrative tribunal's findings regarding the credibility of witnesses giving sworn testimony.

Discretionary decisions – Other discretionary decisions are subject to the abuse of discretion test.

Questions of law – no deference is given to the administrative agency decision and the court reviews questions of law *de novo*.

(b) Non-contested case

The court uses a substituted judgment or *de novo* scope of review in reviewing all non-contested cases. The court will make its own determination and give the agency no deference.

(c) Rulemaking

When reviewing agency rulemaking, the court will use an abuse of discretion scope of review, which affords significant deference to the agency.

G. Appellate Review

1. Contested case

On appeal, review is of the agency decision, not the decision of the trial court, to determine whether it is supported by competent and substantial evidence.

2. Non-contested case

On appeal, review is of the trial court's decision on substantial evidence and whether it correctly declared and applied the law in determining if the agency decision was unconstitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion**.**

SIGNIFICANT MISSOURI LAW DISTINCTIONS

BUSINESS ASSOCIATIONS

General and Business Corporation Law of Missouri (Chapter 351, RSMo): Missouri has enacted the GBCL. Initially, Missouri law followed Illinois law, but more recently, it has tended to pattern itself after provisions of Delaware law.

I. CORPORATE FORMATION

A. **Articles of Incorporation**: To form a de jure corporation, Articles of Incorporation must be filed with the Missouri Secretary of State, along with the required fee. The Missouri Secretary of State website (www.sos.mo.gov) makes the standard forms available online. The person or entity forming the corporation is the incorporator.

1. **Mandatory Provisions**:

a. The Articles of Incorporation must include the name of the corporation, and that name must include the word "corporation," "company," "incorporated," "limited," or end with an abbreviation of one of those words. §351.110, RSMo.

b. The Articles of Incorporation must provide the address of the initial registered office for the corporation and must identify the initial registered agent. This information must be provided for purposes of receiving service of process and communications from the Secretary of State. The registered agent must reside in Missouri. §351.370, RSMo.

c. If the aggregate number of authorized shares exceeds thirty thousand shares or the par value exceeds thirty thousand dollars, then the Articles of Incorporation must indicate the number of shares with and without par value in each class and the par value of each share so designated. The Articles must also include a statement of the preferences, qualifications, limitations, restrictions, and special rights, if any, for the shares of each class. NOTE: Single shareholder corporations are permitted in Missouri. §351.055.1, RSMo.

d. The Articles of Incorporation must include the name and address of each incorporator. §351.055.1, RSMo.

e. The Articles of Incorporation must state the corporation's duration, which can be any number of years or "perpetual." §351.055.1(5), RSMo.

f. The Articles of Incorporation must state the corporation's purpose. §351.055.1(6), RSMo.

2. **Optional Provisions**:

a. The Articles of Incorporation may include the initial number of directors. §351.055.2(1), RSMo.

b. The Articles of Incorporation may explain the extent of any limitation or denial of preemptive rights of shareholders to acquire additional shares. §351.055.2, RSMo.

c. The Articles of Incorporation may limit the personal liability of directors to the corporation or its shareholders. However, statutory provisions restrict the amount of limitation allowed. For example, director liability for breach of the duty of loyalty to the corporation or the shareholders cannot be limited or eliminated. §351.055.2(3); §351.345, RSMo.

d. The Articles of Incorporation (or the Bylaws) can include a provision opting out of the default rule of cumulative voting. §351.245.3, RSMo.

e. The Articles of Incorporation may include provisions that are required to modify statutory default provisions. For example, §351.290 provides that Bylaws are to be amended by the corporation's shareholders unless the Articles of Incorporation place this power with the Board of Directors.

f. The Articles of Incorporation (or the Bylaws) may indicate the number of directors (one or more), and each director's term of service. §351.315, RSMo.

g. The Articles of Incorporation can include any other provisions desired by the incorporator that are not inconsistent with the law. §351.055.2(4), RSMo.

B. **Registration Requirement**: A corporation must file an annual report each year. It is due in the month of incorporation, except as provided in §351.120.8 (which allows for changes to the month in which filing is required) or §351.122 (which allows for biennial filing of registration reports). §351.120, RSMo. Failure to timely file an annual report will result in administrative dissolution of the corporation. §351.484(4), RSMo.

C. **Bylaws**: Bylaws are adopted initially by the Board of Directors, and are subject to amendment by a vote of the shareholders (unless the Articles of Incorporation provide for amendment by the directors). They may contain "any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation." §351.290.1, RSMo.

Bylaws are intended to deal with the relative relationship between the officers, directors, and shareholders. Though Bylaws can address any subject, good Bylaws will contain provisions relating to procedures for shareholders' and directors' meetings; any committees; the titles, terms, and powers of officers and the means for election and removal of same; the number of directors; the terms and powers of the directors and the means for election and removal of same; provisions for amendment of the Bylaws; and provisions for custody and inspection of corporate records. This is not an exhaustive list.

Bylaws are not filed with the Missouri Secretary of State.

D. **Piercing the Corporate Veil**: In certain circumstances, a validly formed de jure corporation can be ignored, and personal liability can be imposed on shareholders. The

leading cases in Missouri discussing the elements required to pierce the corporate veil are: *Collet v. Am. Nat'l Stores, Inc*., 708 S.W.2d 273 (Mo. App. 1986); *Real Estate Investors Four, Inc. v. Am. Design Group Inc.*, 46 S.W.3d 51 (Mo. App. 2001).

Those elements are as follows: (1) complete control such that the corporate entity lacked a separate will at the time of the transaction; (2) the defendant used that control to commit fraud or another bad act; and (3) the previously mentioned control and breach of duty proximately caused the complaining party's injury. *Real Estate Investors Four, Inc. v. Am. Design Group Inc.*, 46 S.W.3d 51, 56 (Mo. App. 2001); *State ex rel. Family Support Division v. Steak'm Take'm LLC*, 524 S.W.3d 584 (Mo. App. 2017).

II. CORPORATE OPERATION

A. Shareholder Meetings

1. **Annual Meetings**: Annual meetings must be held, the primary purpose of which is to elect directors. §351.225.2, RSMo.

2. **Special Meetings**: Special meetings may be held to conduct business requiring shareholder approval if duly noticed by the Board of Directors or any other person authorized by the Articles of Incorporation or the Bylaws. §351.225.3, RSMo. In addition to the normal notice requirements for time and place, notice of special meetings must include the purpose for which the meeting has been called. §351.230.1, RSMo.

3. **Notice**: For annual and special meetings, notice generally must be sent no less than 10 days and no more than 70 days before the meeting. §351.230, RSMo.

4. **Quorum**: Unless otherwise provided in the Articles of Incorporation or Bylaws, a quorum is a majority of the outstanding shares entitled to vote. §351.265, RSMo.

5. **Unanimous Written Consent**: Any action required to be taken by the shareholders at a formal meeting may be taken by unanimous written consent of all shareholders entitled to vote on the matter without a meeting. §351.273, RSMo.

B. Board of Director Meetings

1. **Initial**: An initial meeting is required for organizational purposes as soon as possible after the corporation is formed. §351.080.2, RSMo.

2. **Annual**: Though not required, annual meetings are commonly held to conduct the election of officers and such other routine business as may be appropriate. §351.340, RSMo.

3. **Special**: Special meetings may be called in accordance with the provisions of the Bylaws and are subject to notice requirements. §351.340, RSMo.

4. **Quorum**: A majority of the full Board of Directors constitutes a quorum, though a higher number can be set by the Articles of Incorporation or the Bylaws generally, or as to particular matters to be determined. §351.325, RSMo.

5. **Unanimous Written Consent**: Any action required to be taken by the directors at a formal meeting may be taken by unanimous written consent without a meeting. §351.340, RSMo.

C. **Officers and Agents**

1. **Required Officers**: Missouri corporations must have a president, a secretary, and any other officers required by the specific corporation's Bylaws. Unless prohibited by the Articles of Incorporation or the Bylaws, the same person may hold two or more offices, and the offices of president, chief executive officer, and chairman of the board of directors may each be held by different persons. §351.360, RSMo.

2. **Registered Agent**: Missouri corporations must have a designated registered agent. The registered agent can be an individual who resides in Missouri, or a corporation that is authorized to do business in Missouri and has a business office that is the same as the registered office. §351.370, RSMo. Failure to have a viable registered agent for thirty days or more is a basis for administrative dissolution of the corporation by the Missouri Secretary of State. §351.484(5), RSMo.

III. MAJOR DIFFERENCES BETWEEN MISSOURI CORPORATION LAW AND DELAWARE CORPORATION LAW

These are some, but not all, of the significant differences between the Delaware Code and the Missouri statutes.

A. **Director and Officer Indemnity**: A shareholder approved indemnity provision can expand the scope of indemnity beyond that authorized by statute with the only limit being the inability to indemnify for fraud, deliberate dishonesty, or willful misconduct. §351.355.7, RSMo. Indemnity provisions can cover amounts paid in settlement and incurred expenses. §351.355.1, RSMo. In Missouri, unless the shareholder approved indemnity provision provides otherwise, expenses advanced for an indemnified officer or director must be repaid unless the officer, director, agent, or employee is ultimately determined to have been entitled to indemnity pursuant to the requirements set forth in §351.355. §351.355.5, RSMo. Under the Delaware code, such payments need only be repaid if the officer or director is ultimately found liable. Del. Code Ann. Tit. 8, section 145(e).

B. **Shareholder Action Without Board Approval**: Amendments to the Articles of Incorporation can be submitted directly to shareholders in Missouri without being first authorized by the Board of Directors, as is required in Delaware. §351.090.2(1), RSMo; Del. Code Ann. Tit. 8, section 242(b)(1).

C. **Shareholder Action by Written Consent**: All shareholders entitled to vote must sign unanimous written consent in lieu of a meeting, whereas in Delaware, only the minimum

number of shareholders necessary to take action at an actual meeting need to sign such a consent. §351.273, RSMo; Del. Code Ann. Tit. 8, section 228(a).

D. **Major Corporate Events Requiring a Vote**: In Missouri, a two-thirds majority of the outstanding shares entitled to vote must approve mergers, consolidations, the sale of all or substantially all assets, dissolutions, or reductions in capital, where only a simple majority is required in Delaware. §351.425; §351.400(3); §351.464.5; §351.195.1(3), RSMo; Del. Code Ann. Tit 8, sections 251(c); 271(a); 275(b); 244.

E. **Appraisal Rights**: Delaware only requires appraisals for certain mergers. Del. Code Ann. Tit. 8, section 262(b). Missouri requires appraisals for mergers or consolidation, upon the sale of all or substantially all assets (not in the regular course of business) and for certain share acquisitions involving control of the corporation. §351.405; §351.407.6; and §351.455, RSMo.

IV. DISSOLUTION

A. Voluntary Dissolution

1. If no stock has been issued and no business has been commenced, a majority of the incorporators or initial directors of the corporation can dissolve the corporation by filing Articles of Dissolution, meeting certain requirements, with the Secretary of State. §351.462, RSMo.

2. If stock has been issued, the shareholders can agree to dissolve the corporation by unanimous written consent and delivering Articles of Dissolution to the Secretary of State. §351.466; §351.468, RSMo.

3. The Board of Directors can adopt a resolution recommending dissolution and submit it to the shareholders. The shareholders must approve the dissolution proposal by a two-thirds majority vote (or higher as required by the Articles of Incorporation). §351.464, RSMo.

4. Any dissolution requires the filing of Articles of Dissolution with the Secretary of State, and a wind up of corporate affairs. §351.468; §351.476, RSMo.

B. Involuntary Dissolution

1. By administrative action of the Secretary of State for failing to comply with various statutory requirements, including, but not limited to, failure to pay any final assessment of the Missouri franchise tax and being without a registered agent for thirty days or more. §351.484, RSMo.

2. By action of the Attorney General if the corporation continually abuses the authority conferred on it by law or the corporation obtained its Articles of Incorporation through fraud. §351.494(1), RSMo.

3. By shareholder action via application to the court for liquidation in the event of deadlock or illegal/oppressive/fraudulent conduct by the Board of Directors, or failure to elect successor directors for two consecutive annual meetings by the shareholders. §351.494(2), RSMo. §351.467 provides the procedure for

dissolution in a two shareholder corporation when the two shareholders are deadlocked.

4. By a creditor via judicial proceedings to dissolve if the creditor's claim has been reduced to a judgment or the corporation has admitted in writing that a debt is owed, and the corporation is insolvent. §351.494(3), RSMo.

V. SPECIAL BUSINESS FORMS

A. **Limited Liability Companies**: §§347.010-.189, RSMo. Owners are called members. Entity is taxed like a partnership unless it requests to be taxed as a corporation. Members enjoy limited liability for "corporate" obligations, much like shareholders in a traditional corporation. Members adopt an Operating Agreement to address governance issues. Formation requires the filing of Articles of Organization with the Secretary of State, though no annual reports are thereafter required. An LLC may have one or more members. The name of a limited liability company must contain "limited company," "limited liability company," "LLC," "L.L.C.," "LC," or "L.C."

B. **Professional Corporations**: Chapter 356, RSMo. This type of general corporation may be formed by licensed professionals, including, but not limited to, accountants, chiropractors, dentists, and veterinarians.

C. **Foreign Corporations**: §§351.572-.609, RSMo. A foreign corporation is a corporation formed in another state that must apply for and obtain a Certificate of Authority from the Secretary or State before transacting business in Missouri.

D. **Statutory Close Corporations**: §§351.750-.935, RSMo. A corporation whose stock is held by a small number of shareholders may elect to run the corporation like a partnership by eliminating the Board of Directors.

E. **Not-for-Profit Corporations**: Chapter 355, RSMo. Corporate entities created and operated under Chapter 355 of the Missouri statutes must have a purpose that is almost exclusively nonprofit. They may not have shareholders or pay dividends. Formation, management and operation of nonprofit corporations can be very different from general corporations, and the separate statutory provisions addressing nonprofits should be carefully studied.

F. **General Partnerships**: Uniform Partnership Law, Chapter 358, RSMo. A partnership is "an association of two or more persons to carry on as co-owners of a business for profit and includes, for all purposes the laws of this state, a registered limited liability partnership." §358.060(1), RSMo.

G. **Limited Partnerships**: Uniform Limited Partnership Law, Chapter 359, RSMo. A limited partnership is "a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners." §359.011(7), RSMo.

SIGNIFICANT MISSOURI LAW DISTINCTIONS

CIVIL PROCEDURE

NOTE: Unless expressly amended by legislation, Missouri Supreme Court Rules supersede inconsistent statutory provisions pursuant to the Court's authority to prescribe practice and procedure in the courts. Mo. Const. Art. V, § 5. Recent Orders issued by the Missouri Supreme Court can be found at https://www.courts.mo.gov/page.jsp?id=128693.

I. JURISDICTION OVER THE PERSON AND OVER THINGS

A. General and Specific Personal Jurisdiction

1. Where a corporate defendant purposefully avails itself of the opportunity to do business in Missouri, courts can exercise specific personal jurisdiction over the corporation but only where claims brought against the corporation are related to its contacts with Missouri. *State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. banc 2017).

2. Where a cause of action does not arise out of or is not related to the defendant's contacts with Missouri and the corporation's principal place of business or its place of incorporation is not in Missouri, the state can exercise general personal jurisdiction consistent with due process only when a corporation's activities are "so substantial and of such a nature as to render the corporation at home in that state." *Daimler AG v. Bauman*, 134 S.Ct. 746, 761 n. 19 (2014). Where a defendant owns substantial property in Missouri, employs hundreds of employees in Missouri and generates hundreds of millions of dollars in revenue annually in the state, yet this activity represents a tiny portion of the corporation's entire nationwide business, its Missouri contacts are insufficient to establish general personal jurisdiction over the corporation.

3. Missouri contacts by an agent can be imputed to an out-of-state principal for purposes of determining whether general or specific jurisdiction exists over the out-of-state principal. However, a corporate parent's or managing member's Missouri domicile, standing alone, will be insufficient to impute personal jurisdiction over a distinct corporate entity. *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 2019 WL 3144036 (Mo. banc July 16, 2019).

B. Personal Service on Individuals

1. Transient Jurisdiction — Personal jurisdiction may be secured by serving a defendant with a summons and petition within the territorial limits of Missouri. Rule 54.13.

2. Domicile — A state may assert personal jurisdiction over a defendant if the defendant is domiciled in the state. Thus, Missouri can assert personal jurisdiction over a domiciliary defendant even if that defendant is outside the state at the time served. Rule 54.07.

3. Consent — Alternatively, jurisdiction could be executed pursuant to a party's consent, or by the making of a general appearance.

4. Implied or Inferred Consent — Because of limitations on territorial presence, states have attempted to infer consent to jurisdiction from certain acts of the defendant within the state that have created a cause of action. For example, under the Nonresident Motorist Statute (RSMo §506.210), use of the state's highways is deemed consent to personal jurisdiction over the defendant in actions arising out of such use and to the appointment of the secretary of state as a nonresident's agent for accepting process in lawsuits that arise out of use of the highways.

   Note: These statutes have been upheld as consistent with due process, but it is now recognized that the true basis of jurisdiction is not consent in these cases but fundamental fairness.

5. When Service on Abode Establishes Personal Jurisdiction -- Service of process is a predicate to the trial court's jurisdiction to adjudicate the rights of a defendant. When the requirements for manner of service are not met, the court lacks the power to adjudicate because it has no jurisdiction over the person of the defendant. To prove that a proper method of service was followed, a plaintiff must present proof of service in accordance with Rule 54.20.

   Where a party elects to use a special process server, the party has the burden of showing that all procedural requirements for proper service of process have been met. Unlike a sheriff's return, a special process server's return must show on its face that every requirement of the rule has been met and may not be aided by stated intentions or presumptions. One approved method of personal service upon an individual is "by leaving a copy of the summons and petition at the individual's dwelling house or usual place of abode." Rule 54.13(b)(1).

   When abode service is selected, process must be left "with some person of the individual's family" over age 15. Missouri courts have not defined "family" strictly as meaning blood relation but more broadly as a member of the household. That term has been more specifically defined as where the relation between the defendant and the other person of the household is of a permanent and domestic character not intended to be merely temporary. Where a woman tells the process server that she resides at the house in question and on the return of service the server identifies the woman as over age 15 and a roommate of the defendant, the return is facially valid as prima facie evidence of the facts recited on the return. To impeach a return of service, where service was made on the abode, the defendant must prove by clear and convincing evidence that the party alleged to have been served was not a member of the household or was not over age 15. The trial court is free to believe or disbelieve the defendant's evidence.

C. Service on Corporations

1. Missouri Corporations and Registered Foreign Corporations — Personal jurisdiction over domestic corporations and foreign corporations registered to do business in Missouri is obtained by serving a copy of the summons and petition on the registered agent or any other agent authorized or required by law to receive service of process, or any officer or managing or general agent of the corporation found anywhere in the state, or by leaving the copies at any of the defendant's business offices with the person in charge there. Rule 54.13.

   a. Examples of "Agents"

      The manager of a branch office and a general sales agent have been held to be managing or general agents of corporations, so that leaving a copy of the summons with them constituted service on a corporation. The duties of these individuals indicate an appreciation of the necessity of transmitting important papers to responsible officers.

   b. Those Not Considered Agents

      The following have been held not to be managing or general agents: a watchman of mining property, a clerk-typist or receptionist, an insurance salesperson who maintained an office in her residence but lacked authority to issue or sign policies for the insurer and was paid on a commission basis.

D. Service on Partnerships — Personal service on a general partnership requires individual service on each partner. *Want v. Leve*, 574 S.W.2d 700 (Mo. App. 1978).

E. Service on Municipal, Governmental or Quasi-Public Bodies — Personal jurisdiction over a public or quasi-public corporation or body is obtained by serving: (i) the clerk of the county commission (in the case of a county); (ii) the mayor, city clerk, or city attorney (in the case of a city); or (iii) the chief executive officer (in the case of any other public body). If none of the above are available for service, the court where process issued may designate an appropriate person. Rule 54.13.

II. OUT-OF-STATE SERVICE (Long Arm Jurisdiction)

A. Procedure for Service

1. Manner of Service — Service of summons in long-arm cases is to be made in the same manner as service within the state. Rule 54.14(b).

2. Who May Serve — Service may be made by a person or that person's deputy authorized to serve legal process in the foreign state, or by a person appointed by the court in which the action is pending. Rule 54.14(a).

3. Returns — Whether service is made by a private person or by an officer of a foreign state who is legally authorized to serve summons, return must be by affidavit and it must state the time, manner, and place of service. Rule 54.20(b).

B. Out-of-State Service on Domiciliaries and Residents

1. Requirements for Domicile or Residency

Out-of-state service on any person, or her executor, administrator, or other legal representative, has the same effect as service within the state as long as the person was domiciled in or a resident of Missouri: (i) at the time the cause of action accrued in Missouri; (ii) at the time the action was commenced; or (iii) at the time process was served. If any of these conditions are met, the court acquires personal jurisdiction of the defendant. Rule 54.07.

2. Personal Representative Stands in Decedent's Shoes

A personal representative stands in the litigational shoes of a decedent who is subject to the jurisdiction of Missouri courts.

3. Domicile Distinguished from Residence

Domicile must be distinguished from residence; residence is the place where a person happens to be living, whether or not she intends to make it her permanent home.

C. Long-Arm Statute (RSMo §506.500) - Missouri authorizes out of state personal service on defendants for the purpose of subjecting them to the personal jurisdiction of the court, where the defendant:

1. Is a domiciliary or a resident of Missouri;

2. Does certain acts in the state in person or through an agent;

3. Has lived in a lawful marriage within Missouri, if the other party to the lawful marriage continues to live in Missouri, or if the third party has provided support of the spouse or to the children of the marriage and is a resident of Missouri; or

4. Has engaged in sexual intercourse in the state at or about the time a child was conceived.

Note: The mere fact that Missouri rules allow service outside the state for in personam jurisdiction does not mean that Missouri's assertion of in personam jurisdiction in a particular case is constitutional. That determination requires a second analysis that embraces the requirements of *International Shoe v. Washington,* 326 U.S. 310 (1945).

D. Acts by Which Persons Submit to Jurisdiction of Missouri Courts Through the Long-Arm Statute

1. Transaction of any business within Missouri;

2. Making or acceptance of any contract in Missouri;

3. Commission of tortious act in Missouri;

4. Ownership, use, or possession of Missouri real estate;

5. Contracting to insure any person, property or risk located in Missouri at time of contracting; and

6. Maintenance of marital domicile in Missouri.

Missouri currently uses traditional minimum contacts analysis to determine whether personal jurisdiction exists for transactions and conduct involving internet contact. *Andra v. Left Gate Property Holding, Inc.*, 453 S.W.3d 216 (Mo. banc 2015).

III. SUBJECT MATTER JURISDICTION

A. Subject matter jurisdiction, in contrast to personal jurisdiction, is not a matter of the state court's power over the person, but the court's authority to render judgment in a particular case. Subject matter jurisdiction of the state circuit court is governed directly by the Missouri Constitution. Mo. Const. Art V, §14.

B. In general, subject matter jurisdiction is not subject to waiver and may be raised at any time, even on appeal.

C. If a matter is not jurisdictional but rather a procedural matter required by a statute or rule or an affirmative defense of the sort listed in the affirmative defense rule, it generally may be waived if not raised timely. For example, under *McCraken v. Wal-Mart Stores, East, LP*, 298 S.W.3d 473 (Mo. banc 2009), the question of whether someone is a statutory employee under the Workers' Compensation Act is not a matter of subject matter jurisdiction subject to a motion to dismiss, and a failure to raise the Workers' Compensation Act applicability as an affirmative defense may constitute a waiver of that defense, just as with other affirmative defenses.

IV. VENUE

A. Procedure for Challenging Improper Venue

1. Motions to Transfer — Challenges to venue may not be asserted by a pre-answer motion under Rule 55.27 or as an affirmative defense in defendant's answer. Instead, they must be asserted by a motion to transfer venue pursuant to Rule 51.045. Such a motion must be filed within 60 days after service on the party seeking transfer. Failure to file a timely motion waives objections to

venue. If a timely motion to transfer venue is filed, the venue issue is not waived by any other action in the case.

2. Decisions on Motions to Transfer

a. Grant of Motion — If the issue is determined in favor of transfer (or if no reply is filed), the court will transfer the entire case to a county of proper venue, unless separate trials have been ordered for separate claims. If separate trials have been ordered, the court will transfer only that part of the civil action in which the movant is involved. Rule 51.045(c).

b. Automatic Grant of Motion If Court Fails to Rule — A motion to transfer based on claim of improper venue will be deemed granted if the court fails to rule on the motion within 90 days after the motion's filing. *State ex rel. HeplerBroom, LLC v. Moriarty*, 566 S.W.3d 240 (Mo. banc 2019). However, this time period can be waived in writing by all parties. §508.010.10.

3. Relationship Between Motion to Transfer Venue and Motion for Change of Venue Based on Population — A motion to transfer venue does not deprive a party of any right the party may have to move to change venue under Rule 51.03 if the case is transferred to a county having 75,000 or fewer inhabitants. In that situation, a motion to change venue may be filed within the later of the time permitted by Rule 51.03 or 10 days after being served with notice that the case has been docketed in the transferee court. The right to change venue due to population was eliminated by RSMo §508.011 (Supp. 2005) with respect to tort claims; however, the Missouri Supreme Court has found Rule 51.03 is not inconsistent with the statute and therefore the right still exists. *State ex rel. Audrain Healthcare, Inc. v. Sutherland*, 233 S.W.3d 217 (Mo. banc 2007).

4. Effect of Motion to Transfer on Time for Filing an Answer — Unlike a pre-answer motion under Rule 55.27, a motion to transfer venue does not extend the time for filing an answer.

B. General Rules for Proper Venue

1. Venue and Joinder – Permissive joinder of separate claims cannot establish venue if, absent joinder, venue in that jurisdiction is not proper for each claim. RSMo §507.040 (Supp. 2019)*; State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168 (Mo. banc 2019).

2. Principal Place of Residence

a. Individuals – there is a rebuttable presumption that the county of voter registration at the time of injury is the principal place of residence for individuals. RSMo §508.010.1(1)(Supp. 2019).

b. Corporate Employees - for an individual whose conduct at issue was alleged in at least one count to be in the course and scope of employment with a corporation, the individual's principal place of residence for venue purposes shall be deemed to be the corporation's principal place of residence. RSMo §508.010.1(2)(Supp. 2019).

c. Corporations – The residence of most corporations is deemed for all purposes to be in the county where its registered office is maintained. RSMo §351.375.2 (Corporations Generally); §375.1800 (Supp. 2019) (Insurance Companies).

3. Non-Tort Cases — The following rules apply only if there is no count alleging tort. They apply whether the defendants are individuals, not-for-profit corporations, or for-profit corporations. These non-tort rules also apply to limited liability partnerships, and they probably also apply to limited liability companies. RSMo §508.010.

a. One Defendant Who is Missouri Resident — If there is only one defendant and that defendant resides in Missouri, venue is proper in the county in which (i) that defendant resides, or (ii) the plaintiff resides and the defendant may be found and served with process.

b. Multiple Defendants Residing in the Same County — If there are multiple defendants, and all reside in the same Missouri county, venue is proper in that county. In that situation, venue is probably also proper in the county in which the plaintiff resides if all the defendants may be found in that county.

c. Several Defendants Residing in Different Counties — If there are several defendants and they reside in different counties, venue is proper in any county in which any defendant resides.

d. Several Defendants — Mixed residents and nonresidents — If there are several defendants, some residents and others nonresidents of the state, venue is proper in any county in which any defendant resides.

e. All Defendants Nonresidents of Missouri — If all defendants are nonresidents of Missouri, venue is proper in any Missouri county, provided there is personal jurisdiction over each defendant, independent of each other defendant. RSMo §508.010.2(4) (Supp. 2019).

4. Tort Cases — See Outline Significant Missouri Law Distinctions, Torts.

C. Special Venue Rules for Particular Types of Defendants or Plaintiffs

1. Defendant LLPs — The statute creating LLPs in Missouri provides that suits against LLPs are governed by the general venue rules. However, in non-tort cases, venue of a suit against an LLP is broader, given that LLPs may have

multiple residences (every county in which the LLP has an agent or office for doing its customary business, as well as the counties in which its registered agent and registered office are located.)

2. Plaintiff or Defendant Counties — If any of the plaintiffs is a county, the following venue rules apply:

   a. If there is no count alleging a tort, the case may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside or in the county in which the plaintiff is located, if at least one defendant can be found and served in that county. If the suit is based on contract, the suit can also be brought in the county in which the plaintiff is located or in the county in which any party to the contract resides.

   b. If there is any count alleging a tort, venue in suits by counties is probably governed by general tort venue rules.

3. Actions Against Insurance Companies –RSMo §375.1800-1806 (Supp. 2019). In all actions in which there is any count against an insurer, whether in tort or contract, regarding the rights, benefits, or duties under an insurance contract, venue is in the county where the insurer resides, or if the insured was a resident of Missouri when the insurance contract was issued, the county of the insured's principal place of residence as defined in RSMo §508.010, except

   Claims Involving Uninsured/Underinsured Motorist Coverage or Vexatious Refusal to Pay Claim Under Such Coverage –

   a. Motor vehicle accidents in Missouri - venue is in the county where the motor vehicle accident occurred.

   b. Motor vehicle accidents outside of Missouri – venue is in the county where the insurer resides if a Missouri resident or the insured's principal place of residence on the date the insured was first injured by the accident if in Missouri.

D. Change of Venue

1. By Agreement — In any civil action, if all parties agree in writing to a change of venue, the court must transfer venue to the county within the state unanimously chosen by the parties. If any parties who are added to the cause of action after the date of the transfer do not consent to transfer, the case must be transferred to such county in which venue is appropriate under the general rules based on the amended pleadings. Rule 51.02.

2. For Cause — A change of venue for cause may be ordered in any civil action triable by a jury if: (i) the opposite party has an undue influence over the

inhabitants of the county; or (ii) the inhabitants of the county are prejudiced against the applicants. Rule 51.04(a).

The application must be filed at least 30 days before the trial date or within 10 days after a trial date is fixed, whichever date is later. Rule 51.04(b). If granted, venue will be changed to some other county convenient to the parties where the cause does not exist. Rule 51.04(e).

3. As a Matter of Right in Counties of 75,000 or Fewer Inhabitants - Pursuant to Rule 51.03, a change of venue as a matter of right to some other county convenient to the parties will be ordered in a civil action triable by jury pending in a county having 75,000 or fewer inhabitants. The application must be filed not later than 10 days after the answer is due to be filed, or 10 days after the return date of the summons if an answer is not required, and the applicant need not allege any cause for the change.

4. Alteration of the Parties – Venue may be changed upon application of any party prior to trial, in the event any party is added, removed, or severed from the petition and such event would have changed the determination of venue if in the initial petition. RSMo §508.012 (Supp. 2019).

V. DISQUALIFICATION OR CHANGE OF JUDGE

A. The notion of an impartial decision-maker is implicit in the due process fundamentals of an opportunity to be heard at a meaningful time and in a meaningful manner. The law presumes that a judge will act honestly and with integrity and will not preside over a trial if he or she cannot be impartial, but that presumption can be overcome and disqualification is required if a reasonable person would find an appearance of impropriety and doubt the impartiality of the court. Where the entire record demonstrates both a pre-judgment of the factual and legal issues before the close of the evidence and a bias and prejudice against one party, that party was denied minimal due process.

A trial judge's commentary throughout trial that includes statements:

- •that one party was "just wasting everyone's time"
- •that the court did not "care" about particular evidence and communicated disdain for that party's evidence before the trial was finished
- •that "None of [the party's evidence] is going to make any difference how I rule in this case. I know how I'm going to rule in this case."
- •in response to party stating he would call an expert witness, that "I have got all the evidence I need and all you're doing is, as you have done all day, is beat a dead horse."
- •that "Your egocentrical, self-centered arrogance has taken over."
- •that "I'm going to admit [the exhibit] into evidence because it shows how foolish you are."
- •that "You are a narcissist who can't be dealt with under any circumstances."
- •that "You're a drama queen."
- •that "I have listened to you whine all day."

•that "Most of the stuff we saw today is you belly-aching."

B. If the trial judge is interested or prejudiced, is related to either party, or has been counsel in the cause, an application for change of judge is not required. The judge is considered disqualified to preside over the action and is under a duty to disqualify herself. Rule 51.07. However, a motion to disqualify will usually be made. The motion will state the reason the judge ought to disqualify herself, e.g. bias, prejudice, etc. If the judge refuses to disqualify herself, relief may be sought by way of extraordinary writ praying for the appellate court to direct the judge to disqualify herself.

VI. STATUTES OF LIMITATIONS –

A. One-Year Savings Statute (RSMo §516.230)

If a plaintiff files suit within the statute of limitations, and the suit is dismissed without prejudice, the Missouri "savings statute" permits the plaintiff to re-file within one year after the dismissal. The savings statute extends, but does not shorten, the applicable statute of limitations — if a dismissal occurs before the expiration of the statute of limitations, the plaintiff has either one year under the savings statute or the remainder of the statute of limitations period, whichever period is longer, in which to refile. The savings statute applies to voluntary and involuntary dismissals without prejudice. The savings statute can only be used once.

B. Tolling the Statute

1. Absence of a Resident Defendant (RSMo §516.200). If a defendant is a resident of the state, his absence from the state will toll the statute of limitations in two situations:

   a. He is absent at the time the cause of action accrues in which case the statute of limitations does not begin to run until he returns to the state; or

   b. He is a resident of the state at the time the cause of action accrues, and he subsequently leaves the state and establishes a residence in another state.

   However, this portion of the tolling statute, which applies when the defendant departs from and resides out of Missouri, has been held to impose an unconstitutional burden on interstate commerce in *State ex rel. Bloomquist v. Schneider*, 244 S.W.3d 139 (Mo. banc 2008), abrogated on other grounds by *State ex rel. Norfolk Southern Railway Company v. Dolan*, 512 S.W.3d 41 (Mo. banc 2017).

   Wrongful Death Actions — A different tolling provision (RSMo §537.100) applies in wrongful death actions: If the defendant is absent from the state, the statute of limitations is suspended during the period the defendant is absent. This special wrongful death tolling rule applies even if the defendant was never a resident of Missouri. However, this tolling provision does not apply if the defendant can be served — even

outside of the state — by use of the long arm statute, or if the defendant can be served within the state. Any service on a defendant after the expiration of the statute of limitations or any extension otherwise provided by law must be made within 180 days of the filing of the petition. RSMo §537.100.2 (Supp. 2018).

2. Injunction — The statutory period does not run while the action is stayed by injunction or statutory prohibition. RSMo §516.260.

3. Concealment — The statutory period does not run while the defendant absconds or conceals himself, or while he, by any other improper act, prevents the commencement of the action. RSMo §516.280.

VII. DEFAULT JUDGMENT

A. **Motion to Set Aside** -- Where a defendant files a Motion to Set Aside a Default Judgment under Rule 74.05(d), it must prove (1) that it has a meritorious defense and (2) that there is good cause to set aside the default. The movant bears the evidentiary burden of proving entitlement to relief, and failure to establish either element is fatal to the motion. Although not expressly stated in the rule, Missouri courts consistently hold that a motion under this rule is not self-proving and must be verified or otherwise supported by affidavit or sworn testimony. Where a defendant asserts in its motion that based on information known to it, it does not believe that it owned or controlled the area where plaintiff is claiming he was injured and that the alleged dangerous condition was open and obvious and plaintiff failed to keep a careful look out, but does not present a verified motion, affidavit or other testimony in support of these claimed defenses, defendant fails to meet its burden to show it had a meritorious defense. Belief about the existence of a meritorious defense without supporting facts is not sufficient to justify a finding of a meritorious defense. Without a requirement of some sworn evidence to support a claimed defense in the motion to set aside, parties could fabricate defenses that have no basis in reality. Some sworn testimony or affidavit must support the assertion of a meritorious defense.

B. **As a Sanction for Discovery Violations** – A default judgment entered as a sanction for discovery violations pursuant to Rule 61.01 is not a true default judgment but a judgment on the merits. Rule 74.05(d) governs setting aside a default judgment but does not apply to setting aside a judgment on the merits. A litigant seeking to set aside a judgment imposed as a result of sanctions must proceed under Rule 74.06.

VIII. PLEADINGS

Missouri Fact pleading v. Federal Notice Pleading — In Missouri, fact pleading requires that the pleader state his cause of action with greater specificity than that required under the federal "notice" pleading. The pleader should state ultimate facts that logically support, on application of a rule of law, the liability of the defendant. Each averment of a pleading must be simple, concise, and direct. No technical forms of pleadings are required.

IX. DISCOVERY

NOTE: In 2019, SB224 (effective August 28, 2019) specifically amended several Missouri Supreme Court Rules regarding discovery, and some of those changes more closely align the Missouri rules to the Federal Rules of Civil Procedure, including provisions on electronically stored information.

Effective July 1, 2019, the Missouri Supreme Court also amended the general provisions governing discovery under Rule 56.01. Unless expressly amended by legislation, the rules supersede inconsistent statutory provisions pursuant to the Court's authority to prescribe practice and procedure in the courts. Mo. Const. Art. V, § 5. Recent Orders issued by the Missouri Supreme Court can be found at https://www.courts.mo.gov/page.jsp?id=128693.

A. **Scope In General** –

1. In ruling on an objection that the discovery request creates an undue burden or expense, the court shall consider the issues in the case and the serving party's need for such information to prosecute or defend the case and may consider, among other things, the amount in controversy and the parties' relative resources in determining whether the proposed discovery burden or expense outweighs its benefit. Rule 56.01(c)(Effective July 1, 2019).

2. All parties shall make reasonable efforts to cooperate for the purpose of minimizing the burden or expense of discovery. Rule 56.01(g)(Effective July 1, 2019).

3. Parties may obtain discovery regarding any relevant subject matter involved in the pending action, provided it is proportional to the needs of the case considering the totality of the circumstances, including but not limited to, the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Rule 56.01(b)(1), Amended by L.2019, SB224, effective August 28, 2019 (language similar to F.R.C.P 26(b)(1)).

B. Depositions --

1. Use - Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose. Rule 57.07.

2. Limits –

a. Unless otherwise stipulated, the number of depositions any party may take, without leave of court, is capped at 10 (per party). Rule 57.03(a)(2)(A)(i), Amended by L.2019, SB224, effective August 28, 2019.

b. Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court may allow additional time if needed to fairly examine the deponent or the deposition was impeded or delayed. Rule 57.03(b)(5), Amended by L.2019, SB224, effective August 28, 2019.

3. Top Level Employee Depositions -- When a party seeks to depose a top-level employee of another party and the proposed deponent or his employer seeks to prevent or limit the deposition, the court should consider whether other methods of discovery have been pursued, the party's need for discovery by top-level deposition and the burden, expense, annoyance and oppression of the organization and the proposed deponent. Even if the top-level employee has discoverable information, he or the organization may seek a protective order, which should issue if annoyance, oppression and undue burden and expense outweigh the need for discovery. Where part of a plaintiff's theory of case is that the top level employee originated a company-wide policy and defendant denies that the top level employee made reported statements about the policy or that there was any company-wide effort to, for example, replace older workers with younger ones, the top level employee's testimony in an age discrimination case is clearly relevant and discoverable; there are specific questions that only the top level employee can answer. Trial court's refusal to permit deposition of Top Level Employee under these circumstances is an abuse of discretion. If, on the other hand, a party seeks to begin its discovery by deposing a top-level employee about topics that could be answered by lower level employees, a protective order may be in order to prevent burden, expense, annoyance and oppression.

C. Interrogatories – Unless otherwise stipulated or ordered by the court, any party may serve upon any other party no more than 25 written interrogatories, including discrete subparts. Rule 57.01(a), Amended by L.2019, SB224, effective August 28, 2019.

D. Deposition Upon Written Questions – Unless otherwise stipulated or ordered by the court, the number of depositions upon written question any party may serve upon any other party is capped at 10 (per party). Rule 57.04(a)(2), Amended by L.2019, SB224, effective August 28, 2019.

E. Production of Documents – Documents may be produced for inspection as they are kept in the usual course of business as long as the format is reasonably usable by the requesting party. Rule 58.01(c)(4)(Effective July 1, 2019).

F. Requests for Admissions – Unless otherwise stipulated or ordered by the court, the number of requests for admission any party may serve upon any other party is capped at

25 (per party), not including requests related to the genuineness of documents. Rule 59.01(a), Amended by L.2019, SB224, effective August 28, 2019.

G. Work Product Doctrine and Privilege

1. Experts – Designating an expert witness pursuant to Rule 56.01 does not, absent actual disclosure of the expert's opinions and conclusions, irrevocably waive the protections of the work product doctrine and entitle opponent to make discovery of that expert whose designation is later withdrawn by an adverse party.

2. For party objecting to production of documents based on the attorney-client privilege or the work product doctrine under Rule 58.01, that party must establish such protection "through competent evidence," blank assertions of protection and bare assertions by counsel do not prove themselves and are insufficient.

3. Inadvertent Disclosures – An attorney who has reasonable cause to believe they have received information that contains privileged communications involving an adverse/third party has an obligation to stop reading the material, notify the source attorney, return the information, and take reasonable measures to make it inaccessible. Rule 56.01(b)(9)(A)(ii), Amended by L.2019, SB224, effective August 28, 2019.

4. Waiver – The production of privileged or work-product protected documents, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in the proceeding. Rule 56.01(b)(9)(B), Amended by L.2019, SB224, effective August 28, 2019.

H. **Issuance of protective order** pursuant to Rule 56.01(c) is arbitrary and unauthorized where it is not supported by evidence of good cause. Oral arguments by counsel and exhibits attached to motions are not evidence and are not self-proving.

X. SEALING OF COURT FILES

Presumption of openness of court records supported by Missouri's constitution, case law and the Supreme Court's operating rules can be overcome only by a compelling justification for closure. While justification may exist for sealing part or all of a file where a court identifies specific and tangible threats to important values, parties are not entitled to litigate in private even if both agree with the request to do so.

XI. JURY PRACTICE

A. Instructions

1. Given to Jury Before Closing Argument

In Missouri, unlike most states and the federal system, instructions are given to the jury before the closing argument.

2. Approved Instructions Are Mandatory

If there is an approved MAI instruction applicable to the case that the appropriate party requests or the court decides to submit, the approved instruction must be given to the exclusion of any other on the same subject.

a. Deviation from MAI — If there is a deviation from an applicable MAI instruction that does not need modification under the facts of a particular case, the deviation is error and is presumptively prejudicial error.

3. Doctrine of Spoliation and Curative Instruction -- A finding of spoliation of evidence does not entitle a party to submit a (non-MAI) adverse inference instruction. While an adverse presumption may arise against the offending party, no presumption, inference or abstract statement of law has any place in a jury instruction. This prohibition against a spoliation instruction is based on the principle that the trial court should not comment on the evidence and that such an instruction would constitute such comment. Any inference is one of fact, not of law, and permits the opposing party to argue that the jury may infer that the evidence in question would have been unfavorable to the spoliator's position, but the inference does not prove the opposing party's case. The offending party is entitled to offer other evidence to dispute the inference.

XII. APPEALS

A. **Points Relied Upon –** Rule 84.04(d)

1. The brief must contain the points relied on, each of which must:

a. Identify the trial court ruling, administrative ruling, or action that the appellant challenges;

b. State concisely the legal reasons for the appellant's claim of reversible error; and

c. Explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

2. Supporting Authorities

The petitioner must, immediately following each point relied on, include a list of cases, not to exceed four, and the constitutional, statutory, and regulatory provisions or other authority on which the petitioner principally relies. It is no longer necessary to list all authorities or permissible to list more than four cases. Failure to cite authorities in support of a point will be deemed to be an abandonment of the issue. Similarly, failure to develop the point in the appellant's brief will be deemed an abandonment of the issue. If an issue is one of first impression and no authorities exist, the appellant should state that fact.

SIGNIFICANT MISSOURI LAW DISTINCTIONS

COURTS

I. SUPREME COURT

A. **Composition**—Comprised of seven judges, each selected for a regular term of twelve years. Judges elect one member to serve as chief justice every two years. Generally sits *en banc*.

B. **Jurisdiction**--

1. Original--Supreme Court has original jurisdiction to determine remedial writs, quo warranto, writs of prohibition and mandamus; has original jurisdiction over matters involving the discipline of attorneys and contested statewide elections; and is permitted by its supervisory authority over all Missouri courts to establish rules of practice.

2. Appellate

   a. The Supreme Court has exclusive appellate jurisdiction over cases involving: (i) the validity of a treaty or statute of the United States; (ii) the validity of a Missouri statute or provision of the Missouri Constitution; (iii) the construction of the revenue laws of the State; (iv) challenges to a statewide elected official's right to hold office; and (v) punishments imposing death.

   b. The Supreme Court will hear appeals of cases first heard by the Court of Appeals if an application for transfer to the Supreme Court filed by a party is sustained by either the Court of Appeals or the Supreme Court.

   c. The Supreme Court must hear appeals of cases transferred to it by the court of appeals where a dissenting judge certifies the opinion contrary to a previous opinion of the Supreme Court or the Court of Appeals.

II. APPELLATE COURTS

A. **Composition**—there are three districts of the Missouri Court of Appeals--the Western, Eastern and Southern Districts. The Western District has 11 judges. The Eastern District has 14 judges. The Southern District has 7 judges. Districts may sit *en banc*, but typically sit in division panels of three judges. Appellate judges serve twelve-year terms.

B. **Jurisdiction**--the Court of Appeals may issue and determine original remedial writs. General appellate jurisdiction extends to all appeals from the inferior courts within the counties in each district, unless a matter is within the exclusive jurisdiction of the Supreme Court.

III. CIRCUIT COURTS

A. **Composition**— the State of Missouri is divided into 46 judicial circuits, with each circuit comprised of one county, or in some cases more than one contiguous county.

B. **Jurisdiction**--circuit courts have jurisdiction over all cases and matters, civil and criminal.

1. Associate Circuit Judges—have jurisdiction in civil cases as set by statute. They may also hear any case if so assigned by the presiding judge of the Circuit.

2. Circuit courts may hear appeals from associate circuit courts. See *Turner-Bey v. Hagenhoff*, 413 S.W.3d 676 (Mo. App. W.D. 2014) (Statutes provide that appeal from associate circuit courts is to the circuit court for *de novo* review, not to the court of appeals for review on the record.)

3. Circuit Judges--may hear all types of cases. Though circuit courts may have a designated "family court" or "probate court," these are not separate courts, but are divisions of the circuit court.

   Each circuit court is required to establish a treatment court division by August 28, 2021. A "treatment court division" is a specialized, non-adversarial court division with jurisdiction over cases involving substance-involved offenders and making extensive use of comprehensive supervision, drug or alcohol testing, and treatment services. RSMo §478.001.2 (Supp. 2019).

4. Commissioners--are selected by circuit courts and sit in matters in family court, probate court, or drug court as assigned by the circuit courts.

IV. SELECTION OF JUDGES

A. **Merit Selection--the "Non-Partisan Court Plan."** During the 1930s, the public became increasingly dissatisfied with the increasing role of politics in judicial selection and judicial decision-making. Judges were plagued by outside influences due to the political aspects of the election process, and dockets were congested due to time the judges spent campaigning.

Then, in November 1940, voters amended the Missouri Constitution by adopting the "Nonpartisan Selection of Judges Court Plan," which was placed on the ballot by initiative petition. The adoption of the plan by initiative referendum resulted from a public backlash against the widespread abuses of the judicial system by the "Boss Tom" Pendergast political machine in Kansas City and by the political control exhibited by ward bosses in St. Louis.

The Missouri nonpartisan court plan, commonly called the Missouri Plan, since has served as a national model for the selection of judges and has been adopted in more than 30 other states.

Scope of the Nonpartisan Court Plan

The nonpartisan plan provides for the selection of judges based on merit rather than on political affiliation. Initially, the nonpartisan plan applied to judges of the Supreme Court; the court of appeals; the circuit, criminal corrections and probate courts of St. Louis city; and the circuit and probate courts of Jackson County. In 1970, voters extended the nonpartisan plan

to judges in St. Louis County, and three years later, voters extended the nonpartisan plan to judges in Clay and Platte counties. These changes are reflected in the Missouri Constitution, as amended in 1976.

The Kansas City Charter extends the nonpartisan selection plan to Kansas City municipal court judges as well. Under the constitution, other judicial circuits may adopt the plan upon approval by a majority of voters in the circuit. In November 2008, Greene County voted to extend the nonpartisan plan to its judges.

Nonpartisan Judicial Commissions under the Plan

Under the Missouri Nonpartisan Court Plan, a nonpartisan judicial commission reviews applications, interviews candidates and selects a judicial panel. For the Supreme Court and Court of Appeals, the Appellate Judicial Commission makes the selection. It is composed of three lawyers elected by the lawyers of The Missouri Bar (the organization of all lawyers licensed in this state), three citizens selected by the governor, and the chief justice, who serves as chair. Each of the geographic districts of the Court of Appeals must be represented by one lawyer and one citizen member on the Appellate Judicial Commission.

Each of the circuit courts in Clay, Greene, Jackson, Platte and St. Louis counties and St. Louis city has its own circuit judicial commission. These commissions are composed of the chief judge of the court of appeals district in which the circuit is located, plus two lawyers elected by the bar and two citizens selected by the governor. All of the lawyers and citizens must live within the circuit for which they serve the judicial commission.

Filling Judicial Vacancies under the Nonpartisan Court Plan

Regardless of the commission handling the applications, the constitutional process of filling a judicial vacancy is the same. With any vacancy, the appropriate commission reviews applications of lawyers who wish to join the court and interviews the applicants. It then submits the names of three qualified candidates – called the "panel" of candidates – to the Missouri governor.

Normally, the governor will interview the three candidates and review their backgrounds before selecting one for the vacancy. If the governor does not appoint one of the three panelists within 60 days of submission, the commission selects one of the three panelists to fill the vacancy.

The People Retain a Say over Nonpartisan Court Judges

The nonpartisan plan also gives the voters a chance to have a say in the retention of judges selected under the plan. Once a judge has served in office for at least one year, that judge must stand for a retention election at the next general election. The judge's name is placed on a separate judicial ballot, without political party designation, and voters decide whether to retain the judge based on his or her judicial record. A judge must receive a majority of votes to be retained for a full term of office. The purpose of this vote is to provide another accountability mechanism of the nonpartisan plan to ensure quality judges. If a judge retires or resigns during or at the end of his or her term, a vacancy is created, which will be filled under the Missouri Nonpartisan Court Plan as described above.

To inform voters about the performance of nonpartisan judges, a judicial performance evaluation committee, made up of both lawyers and non-lawyers, evaluates objective criteria including decisions written by judges on the retention ballot as well as surveys completed by lawyers and jurors who have direct and personal knowledge of the judges. The judges are

rated according to judicial performance review criteria, including whether they: administer justice impartially and uniformly; make decisions based on competent legal analysis and proper application of the law; issue rulings and decisions that can be understood clearly; effectively and efficiently manage their courtrooms and the administrative duties of their office, including whether they issue decisions promptly; and act ethically and with dignity, integrity and patience. The results of these judicial performance evaluations then are distributed to the public via the media, the League of Women Voters and the Internet.

The success of the plan in selecting qualified judges is evident from the fact that, since its adoption, the public has not voted any appellate judge out of office, and only four trial judges have been voted out of office.

B. In circuits that have not adopted the Non-Partisan Court Plan, judges are elected to fill available seats.

SIGNIFICANT MISSOURI LAW DISTINCTIONS

ESTATES

An individual has no right, constitutionally or otherwise, to transfer his or her estate at death. Accordingly, all such "rights" are statutory, and there are probably no laws more unique to each state than the laws governing wills and the transmission of property at an individual's death. Since 1975, however, state lawmakers have more frequently looked to the Uniform Probate Code for guidance when revising statutes pertaining to wills and estates, including Missouri when the probate code was entirely rewritten in 1980.

The Missouri probate code is set forth in Chapters 472, 473, 474 and 475 of the Revised Statutes of Missouri. In addition, §461.300, RSMo, allowing recovery of nonprobate assets for payment of claims and allowances, is deemed to be a part of the probate code.

I. WILLS

A. Execution of Will

1. Missouri law differs from most other states by not requiring the following:

    a. No requirement will be signed by testator at end of the document, or at any other particular place. Just "signed by the testator, or by some person, by his direction, in his presence". (§474.320) Witnesses, on the other hand, must "subscribe" their names to the will.

    b. No requirement testator sign will in the presence of witnesses, nor that witnesses sign in each other's presence. Each witness must, however, sign in presence of testator and testator must advise/verify to witness that testator did sign. (§474.320)

    c. No requirement will be dated.

    d. No requirement will have an attestation clause.

2. Missouri does have some variations with respect to execution of a will:

    a. Testator must request witnesses to witness will. This request may be inferred from facts and circumstances.

    b. Witnesses must be aware document is a will ("publication"). This, too, may be inferred.

B. Presentment (§473.050)

1. If a will is "presented" within the time limits set forth in §473.050.3, then the will may be admitted and an administration of the estate had at any time thereafter. (§473.050.4)

2. The term "presented" means delivery of the will to the appropriate probate division together with an appropriate document seeking admission of the will within the time limits set forth in §473.050.3. (§473.050.2)

3. If there is no will or a will is not timely presented, then an intestate administration must be initiated within one year following death. (§473.050.6)

4. Initiation of intestate proceedings begins with filing of a petition for issuance of letters. It is not required that estate be opened within the year. *In re Estate of Givens*, 234 S.W.3d 519 (Mo.App. E.D. 2007).

II. INTESTATE SUCCESSION (§474.010)

The primary distinction between Missouri and most other states is the length to which the statute goes to avoid an escheat. If the decedent has no spouse or descendants, then estate to ancestors (without limit) or their descendants if related in the ninth degree. If that does not work, then to heirs of predeceased spouse(s), in the same manner.

III. PROBATE PROCEDURAL RULES

A. Rules of Civil Procedure Not Applicable – Mostly

1. Only 11 of the Rules of Civil Procedure apply at all times to proceedings in the probate division: Rules 41, 54.18, 55.03, 56, 57, 58, 59, 60, 61, 62 and 67.03. (Rule 41.01(b))

2. The Rules of Civil Procedure are fully applicable in a limited number of matters where the probate code specifically requires application of the Rules, e.g., a discovery of assets proceeding. (§472.141.1)

B. Adversary Probate Proceeding

1. Defined: "[A]ny proceeding…which requires, as a condition precedent to an entry of an order or judgment on the merits, notice of hearing to persons interested in the proceeding, [with certain exceptions]…." (§472.140.2).

2. Adversary probate proceedings are governed by the Rules of Civil Procedure, but with exceptions:

   a. If the probate code prescribes the applicable practice, procedure or pleading, the probate code governs.

   b. Chapter 509 and Rule 55 do not apply unless the court orders all or specific portions applicable.

3. If the court determines a proceeding is an adversary probate proceeding after the proceeding has commenced, then the court "may", on motion of a party or court's own motion, enter an order specifying which provisions of Chapter 509 and Rule 55 will apply.

IV. NONPROBATE TRANSFERS – RECOVERY

Missouri "invented" the nonprobate transfer law and still has the most comprehensive statutory provisions on the matter. (§§461.003-461.081). One of the unique Missouri law provisions is the recovery statute, §461.300, which is treated as a part of the probate code.

A. When Recovery Available

1. The purpose of the recovery statute is to provide funds for payment of specified debts and obligations of a decedent when the probate estate is insufficient.

2. The debts and obligations for payment of which recovery may be had are:

   a. Statutory allowances (§§474.250, 474.260 and 474.290);

   b. Claims remaining unpaid; and

   c. Expenses of administration, although recovery is not allowed if the deficiency is solely attributable to such expenses. (§461.300.1)

B. Recoverable Transfers

1. Transfers made pursuant to the provisions of the nonprobate transfer law (§§461.003-461.081) may be recovered.

2. Also recoverable are "any other transfer of a decedent's property other than from the administration of the decedent's probate estate:"

   a. If the property would have been available to satisfy a debt of the decedent immediately prior to decedent's death; and

   b. Only to the extent of the decedent's contribution to the value of the property. (§461.300.10(4))

C. Procedure

1. The personal representative has the first right to initiate a recovery action ("accounting"). (§461.300.2)

2. A "qualified claimant" (§461.300.10(3)) may force initiation of the action by making a "written demand" upon the personal representative to initiate recovery proceedings. If the personal representative does not do so within 30 days after *receipt* of the written demand, then any qualified claimant may begin proceeding. (§461.300.2)

3. A recovery action must be commenced within 18 months after the decedent's date of death. *Id*. This period may be shortened, however, to 16 months, e.g., if written demand is not received by personal representative until the last day of the 16th month, the next month is a 30-day month, and the personal representative does not commence action, then time will expire before a qualified claimant can initiate proceedings.

D. Parties, Contribution

1. It is not necessary to name all nonprobate transferees as parties – one is sufficient. Filing of the accounting petition "freezes" all recoverable transfers, and later discovered transferees can be joined. (§461.300.4)

2. Each transferee joined as a party is liable for a pro rata share of the value of the property received by that transferee to provide for payment of the shortfall of estate assets. (§461.300.1) **NOTE:** Recovery of the transferred asset itself is not necessary, nor contemplated, as the transferee is liable for "value" of transferred property. *Id.*

E. Personal Representative – Extended Liability

1. If demand is made upon the personal representative to initiate recovery proceeding and he or she does not, then the personal representative must provide full information on all recoverable transfers known to him or her. (§461.300.2)

2. If the personal representative does not provide full information, then the 18-month period for bringing an action is tolled with respect to transfers made to the personal representative. (§461.300.2)

SIGNIFICANT MISSOURI LAW DISTINCTIONS

EVIDENCE

I. MISSOURI EVIDENCE

Missouri is one of only twelve states that has not adopted a variation of the Uniform Rules of Evidence. Many of the fundamental precepts of evidence in Missouri, such as Missouri's hearsay rule and most of the hearsay exceptions, are matters of common law. In addition, constitutional provisions, statutes, and Supreme Court Rules address, either expressly or indirectly, evidence issues. Rules promulgated in accordance with the Supreme Court of Missouri's authority to prescribe practice and procedure in the courts supersede statutory provisions inconsistent with the rules, unless the statute expressly amends the Supreme Court Rule. Mo. Const. Art. V, § 5; Rule 41.02.

II. AUTHENTICATION REQUIREMENTS FOR WRITTEN RECORDS

Admission of Business Record Based on Custodian of Records Affidavit.

Any record or copies of records reproduced in the ordinary course of business shall be admissible as a business record, subject to procedural and substantive objections, in any court in Missouri upon an affidavit of a qualified custodian stating that the records were kept in the ordinary course of business as explained in RSMo §490.680.

III. EVIDENCE REGARDING THE ACTUAL COST OF MEDICAL TREATMENT RSMo §490.715

RSMo §490.715 (amended effective 8/28/17) NOTE: Cases predating these amendments may no longer provide precedent.

Missouri statutes modify the common law with regard to the collateral source rule, which prevents admission of any evidence of compensation the plaintiff received from an outside source to mitigate or reduce the tort-feasor's damages. With respect to damages relating to medical treatment rendered to a plaintiff, §490.715.2 provides that if, prior to trial a defendant, his or her insurer, authorized representative or any combination of these, pays for all or any part of a plaintiff's claims for special damages then any portion of that plaintiff's claim for special damages that is satisfied by a payment from a defendant, its insurer, authorized representative or any combination of those, are not recoverable from that defendant.

Further, under §490.715.5, evidence of the actual cost of the medical care rendered to the plaintiff may be admitted. "Actual cost of the medical care or treatment" is defined as "a sum of money not to exceed the dollar amounts paid by or on behalf of a plaintiff or a patient whose care is at issue plus any remaining dollar amount necessary to satisfy the financial

obligation for medical care or treatment by a health care provider after adjustment for any contractual discounts, price reduction, or write-off by any person or entity." §490.715.5(2). This language has been held to not limit evidence of medical charges to the actual amount paid, but, rather, to permit into evidence both the amount charged and the amount paid. *Brancati v. Bi-State Development Agency*, 571 S.W.3d 625 (Mo. App. 2018).

IV. OPINION TESTIMONY BY EXPERT WITNESS RSMo §490.065

RSMo §490.065 (amended effective 8/28/2017) NOTE: Cases predating these amendments may no longer provide precedent.

This statute governs the admissibility of expert testimony but recent changes affect certain civil (not matters involving marriage, dissolution, adoption, child support, orders of protection, juvenile, family court and probate) and criminal cases. In those cases, an expert qualified by knowledge, skill, experience, training or education may testify if his or her opinions:

- Are based on scientific, technical or other specialized knowledge that will help the trier of fact understand the evidence or determine a fact in issue;
- Are based on sufficient facts or data;
- Are the product of reliable principles and methods; and
- Reflect that the expert has reliably applied the principles and methods to the facts of the case.

The 2017 amendments to RSMo §490.065 changed the standard for admission of expert testimony to model the Federal Rules of Evidence, and federal caselaw may be relevant, but not controlling, to construction and application of the statute. *Jones v. City of Kansas City*, 569 S.W.3d 42 (Mo. App. 2019).

Police Officer as Expert on Fault in a Vehicular Accident

Missouri courts uniformly hold that a police officer who does not witness an accident cannot offer an opinion as to the fault of a party to an accident. This rule applies regardless of whether the officer is testifying as an expert or not, for the reason that a jury will likely give undue weight to a police assessment of fault in a traffic accident. In addition, an expert witness's testimony should not be admitted unless it is clear that the jurors themselves are not capable of drawing correct conclusions from the facts. Because of widespread highway travel and the frequency of collisions, in most instances a jury composed mostly of adult drivers is deemed capable of reaching its own conclusions about fault and degree of fault.

V. SPECIAL RULES FOR CERTAIN CATEGORIES OF WITNESSES

A. **Rape Shield Statute** — RSMo §491.015

In prosecutions related to sexual conduct, opinion and reputation evidence of the complaining witness' prior sexual conduct is inadmissible except where such specific instances are:

1. Evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime, and the evidence is reasonably contemporaneous with the date of the alleged crime;

2. Evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

3. Evidence of immediate surrounding circumstances of the alleged crime; or

4. Evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

B. **Child Victim Witness Protection** — RSMo §491.680

1. In any criminal prosecution under Chapters 565, 566 or 568 involving an alleged child victim, upon motion of the prosecuting attorney, the Court may order that an in-camera videotaped deposition of the testimony of the alleged child victim be made for use as substantive evidence at preliminary hearings and at trial.

2. The court may also exclude the defendant from the videotape deposition proceedings in which the child is to testify. Where any such order of exclusion is entered, the child shall not be excused as a witness until the defendant has had a reasonable opportunity to review the videotape deposition in private with his counsel and to consult with his counsel; and until his counsel has been afforded the opportunity to cross-examine the child following such review and consultation.

3. The attorney for the defendant shall have at least two opportunities to cross-examine the deposed alleged child victim: once prior to the preliminary hearing and at least one additional time prior to the trial.

C. **Admissibility of Criminal Convictions for Impeachment Purposes** - RSMo §491.050

1. Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility

in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

VI. DEPOSITION TESTIMONY AS EVIDENCE

Depositions May Be Used at Trial for Any Purpose.

Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose. Rule 57.07.

VII. "ME, TOO" EVIDENCE IN DISCRIMINATION CASE UNDER MISSOURI HUMAN RIGHTS ACT - CHAPTER 213, RSMo

Note: 2017 legislative changes in this Act may call into question the continued viability of some of the evidentiary rulings below related to claims of discrimination.

A. Strict similarity of others' allegations of discrimination is not required for admission of testimony as circumstantial evidence of employer's discriminatory intent if the evidence is probative of intent to discriminate. *McKinney v. City of Kansas City*, 2019 WL 1028080 (Mo. App. March 5, 2019).

B. There is no requirement that plaintiff must claim pattern and practice or hostile work environment to justify admission of this kind of testimony.

C. Circumstantial evidence of employment discrimination must be both logically and legally relevant to be admissible. *Cox v. Kansas City Chiefs Football Club*, Inc., 473 S.W.3d 107 (Mo. banc 2015); *Terpstra v. State*, 565 S.W.3d 229 (Mo. App. 2019).

1. Logically relevant means that evidence tends to make the existence of any fact that is of consequence to the case determination more probable or less probable than it would be without the evidence or if it tends to corroborate evidence which is itself relevant and bears on a principal issue of the case.

2. Legal relevance requires the trial court to balance the probative value of the evidence against its prejudicial effect on the jury.

    a. Where a plaintiff alleges a company-wide, top-down policy of replacing older employees throughout the company with younger ones and offers testimony by other employees of age-related discriminatory events that occur within months of plaintiff's own firing, testimony by other employees in the same protected class about discriminatory acts directed at them can be relevant in a single-act discrimination case and any *per se* exclusion of such evidence would be an abuse of discretion.

b. Admissibility must be determined on a witness-by-witness basis in which one factor may be whether the same actors are involved in each decision about each witness-employee, but it cannot be the only factor. Other factors could include whether other proffered discriminatory conduct by the employer occurred close in time to the events alleged by the plaintiff, whether the witness and plaintiff were treated in a similar manner, whether the same actors were involved, whether the same supervisors were involved and whether the witness and plaintiff were otherwise similarly situated. Evidence of other firings or forced resignations at the hands of other decision makers may be admissible in a case of discriminatory discharge if the evidence would be relevant to the plaintiff's circumstances and theory of the case.

VIII. IN EMPLOYMENT CASES, "STRAY REMARKS" AND OTHER COMMENTS BY "NON DECISION MAKERS" DO NOT CONSTITUTE DIRECT EVIDENCE OF DISCRIMINATION BUT MAY BE ADMISSIBLE AS CIRCUMSTANTIAL EVIDENCE OR FOR OTHER REASONS

A. The distinction between direct and circumstantial evidence of discrimination does not control decision of admissibility.

B. Stray remarks in the workplace, statements by non-decision makers and statements by decision makers unrelated to the decisional process at issue can be admissible as circumstantial evidence of discrimination or for other reasons. Courts exclude such statements as not constituting *direct evidence* of discrimination for the narrow purpose of a burden-shifting analysis in summary judgment adjudications. In those cases, the courts are not considering whether such statements are properly admissible for other reasons. For example, in a case claiming age discrimination, a statement made by a company executive close in time to plaintiff's firing but who was not the decision maker in the plaintiff's firing can support plaintiff's theory that his firing was part of a company-wide policy of age discrimination and therefore should be admissible. In addition, such statements also may be admissible as an admission of a party opponent – where the agent or employee, in making the statement, was acting within the scope of his authority.

IX. ADMISSION OF PRIOR CONSISTENT STATEMENTS

Impeachment with a prior inconsistent statement and a charge of fabrication or improper influence or motive represent two separate and independent grounds for admission of a prior consistent statement. A charge of recent fabrication made in an opening statement is sufficient to warrant the introduction of evidence otherwise classified as hearsay. Under such circumstance, exclusion of testimony regarding consistent statements made by a party at a time that contradicts a claim of recent fabrication would have a material effect on the trial as it would function as a substantial affirmation of that party's version of events and therefore would be an abuse of discretion.

X. SPOLIATION OF EVIDENCE

A. Rule 61.01 and the spoliation doctrine are separate, complementary and not mutually exclusive tools a trial court has to ensure fundamental goals of a trial: seek the truth and do justice.

1. Spoliation Doctrine is distinct from sanctions under Rule 61.01 because the doctrine works as an evidentiary remedy to punish the spoliator, is not focused on the prejudice caused to the opposing party as a result of the missing evidence, and requires a mental state component greater than simple negligence.

2. Spoliation is the intentional act of destruction, significant alteration of, concealment or suppression of relevant evidence or the failure to determine whether certain evidence exists.

3. The movant may show that the alleged spoliator had a duty or should have recognized a duty to preserve the evidence. To be spoliation, the destructive act must be intentional, and to give rise to an adverse inference the movant must make a prima facie showing that the opponent destroyed missing evidence under circumstances manifesting fraud, deceit or bad faith.

4. If the party asserting the doctrine makes its required showing, it is entitled to an adverse inference which holds the spoliator to admit that the missing evidence would have been unfavorable to its position. No further inference or jury instruction is permitted. The inference is a permissible deduction the trier of fact may make, but it does not prove the opposing party's case. The inference also does not prevent the spoliator from presenting other evidence relating to the same subject matter as the missing evidence. For example, a finding of spoliation in the destruction of a videotape of the incident at issue would prevent the spoliator from presenting a witness to testify about what was on the tape but would not prevent a witness from testifying as to what he personally observed about the incident as it happened.

B. Under Rule 61.01 a trial court has broad discretion and many options for sanctioning a party's failure to properly respond to discovery, but the court must find that the opposing party was prejudiced by the other party's failure and limit any sanction only to that which is necessary to accomplish the purposes of discovery.

SIGNIFICANT MISSOURI LAW DISTINCTIONS

FAMILY LAW

Missouri family law is an area primarily established by statutes contained in Chapters 451-455 of the revised statutes. This covers requirements for marriage, dissolution of marriage, adoption, enforcement of child support orders and adult abuse. There are also court decisions interpreting these statutes, mostly regarding issues of property division and maintenance in a dissolution action.

I. MARRIAGE - Chapter 451 RSMo

A. Prohibited Marriages

1. Marriages between (1) ascendants and descendants; (2) brothers and sisters; (3) nieces, nephews, aunts, and uncles; (4) first cousins are prohibited. §451.020.

2. Marriages involving a person who lacks mental capacity to enter into a marriage contract is prohibited unless the court with jurisdiction approves the marriage. §451.020.

3. Same sex marriages were prohibited and were not recognized even if lawfully contracted in another state under §451.022, RSMo. This provision is no longer enforceable under the U.S. Supreme Court decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

4. A person under the age of 18 must have parental consent and under 16 is prohibited from marrying. Marriage between a person 21 or older to someone under 18 is prohibited. §451.090 (Supp. 2018).

B. Void/Voidable Distinction

A void marriage is one prohibited by statute and cannot be ratified. A voidable marriage can be ratified. A voidable marriage is one that is valid until one of the parties establishes grounds for annulment in a proceeding for declaration of invalidity of marriage.

II. DISSOLUTION OF MARRIAGES - Chapter 452 RSMo

A. Institution of Action

1. Section 452.310 sets forth very specific items that must be contained in a petition for dissolution of marriage. The petition must be verified.

2. The petition is not filed unless summons is issued or respondent files a notarized entry of appearance or an attorney files an entry of appearance. Thus, do not send the clerk the petition and ask to hold summons. §452.311.

3. The standard for granting a dissolution is that the marriage is irretrievably broken and there is no likelihood the marriage can be preserved. §452.305.1(2).

Grounds need not be proven unless the spouse denies the marriage is irretrievably broken, then the petitioner must prove statutory grounds. §452.320.

4. Venue is proper where either the petitioner or the respondent resides. §452.300.

5. There is a jurisdictional residency requirement that either spouse be a Missouri resident for more than 90 days preceding the filing of the petition. §452.305.

6. There is a waiting period of 30 days after the filing of the petition before a dissolution can be granted. §452.305.

7. Most circuits have extensive local rules that cover dissolution actions. These cover required parenting classes, pro se litigants, standard discovery forms, income and expense and property forms, court ordered mediation, and judgments by affidavit.

B. Property Issues

1. Separation agreements are authorized if the Court finds the agreement is not unconscionable and the terms are binding on the Court except for child custody, support, and visitation issues. §452.325.

2. Property is classified as marital property or non-marital property. The statute defines non-marital property, which is generally property acquired before marriage or acquired during marriage as a gift or inheritance. §452.330.

3. Marital property is divided based upon statutory factors set forth in §452.330, including the conduct of the parties during the marriage. Non-marital property can be transmuted to marital property (e.g. under the "source of funds" rule, non-marital property that is subject to a loan may become marital property to the extent marital funds are used to pay off the loan).

4. The Court is required to divide all property and all debts of the marriage. Case law gives the trial judge fairly broad discretion in dividing the property.

C. Maintenance

A party may be granted maintenance provided they lack sufficient property, including marital property, to provide for their reasonable needs and are unable to support themselves through proper employment. The statute, §452.335, sets forth the factors which the Court may consider in determining the amount and duration of maintenance. A maintenance order may be modifiable or non-modifiable. Case law gives the trial judge broad discretion in awarding maintenance. Recently, the courts of appeal have issued a number of opinions on terms of maintenance, imputing income, and evidence of reasonable needs.

D. Child Custody

1. Custody of children is determined upon the best interests of the child. Custody under §452.375 means joint legal custody, sole legal custody, joint physical custody or sole physical custody. It is public policy of the state as set forth in the statute to see that both parents get frequent, continuing, and meaningful contact with the children.

2. The statute sets forth the factors the Court can consider in custody awards.

3. Each parent, individually or jointly, must submit a parenting plan covering a variety of custody and visitation issues specified in §452.310.

4. Child custody orders may be modified on a showing of a substantial and continuing change of circumstances such that the arrangements are no longer in the child's best interest.

5. Either parent seeking to relocate outside of the state must have the consent of the other spouse or seek prior approval of the Court. §452.377. The statutory requirements for notice of relocation are very specific and failure to technically comply with the provision can be fatal to a parent's attempt to move. Recent amendments require the notice include the other parent's right to file a motion to prevent the relocation, which must be accompanied by an affidavit setting forth specific good faith basis for opposing the relocation. §452.377 (Supp. 2019).

6. Several circuits have standard visitation plans that the Court usually follows where the parties do not agree.

7. A grandparent may be awarded visitation rights in certain circumstances. §452.402 (Supp. 2019).

8. If the custodial parent is a participant in the address confidentiality program under §589.663, the Court is required to order reports and records pertaining to the minor child not include the address of the custodial parent and may require other mandatory address disclosures be made under seal. §452.375.12; §452.377 (Supp. 2018).

E. Child Support

The factors the Court can consider in ordering child support are set forth in **§**452.340. The presumed amount of child support is determined by Supreme Court Rule 88.01. NOTE: Recent orders and forms issued by the Missouri Supreme Court can be found at https://www.courts.mo.gov/page.jsp?id=128693.

1. The amount of child support is determined using Form 14, which is based on the parties gross income and a chart per Supreme Court Rule 88. The parties must submit a Form 14. The Court is required to follow the Form 14 amount unless the Court specifically finds after consideration of all relevant factors, the amount is unjust or inappropriate.

2. In determining the child support amount under Form 14, a court can impute income to a spouse who is voluntarily under-employed.

3. The Court is required to make an order as to which parent provides health insurance for the child and the amount of that health insurance is considered in Form 14.

4. Under Form 14, the amount of child support can be reduced by a small percentage based on the amount of visitation.

5. Child support ends when the child reaches 18, unless the child is a full-time student and then support continues to age 21. There are specific requirements that must be followed for the child support to continue while the child is in college §452.340. These requirements are strictly enforced by the courts. *Brown v. Brown*, 370 S.W.3d 684 (Mo. App. 2012).

6. Missouri has adopted the Uniform Interstate Family Support Act. Chapter 454, RSMo.

III. ENFORCEMENT OF CHILD SUPPORT - Chapter 454

By statute, the Missouri Division of Family Services is authorized to enforce child support actions. The division may file an action against a putative father to establish paternity and set a child support amount. In addition to the usual mechanisms to enforce money judgments, the agency has added powers to lien certain property, lawsuits, and workers compensation claims. §§454.514-454.519. The agency also has the power to suspend the obligor's driver's license.

IV. ADULT ABUSE - Chapter 455

Under Chapter 455, a court may enter an order of protection to prevent harassment and abuse. An ex parte order of protection may be obtained by filing of a petition meeting the statutory requirements.

1. Abuse involves more than physical contact or the threat of it. It includes forms of harassment and stalking. §455.010.

2. The Court is required to hold a hearing 15 days after the petition is filed and may continue the order of protection from 180 days to 1 year. §455.040. An order may be renewed and the statute contains a mechanism for automatic renewal.

3. Orders of protection may include temporary orders of child custody. §455.045.

SIGNIFICANT MISSOURI LAW DISTINCTIONS

REAL PROPERTY

Unlike many areas of the law, the laws governing real property, at least in common law jurisdictions, tend to be highly uniform. This occurs because the common law states initially adopted the same provisions of English law as a starting point. Accordingly, only a few areas of real property law are unique to Missouri.

The statutory provisions governing real property in Missouri are set forth in Chapters 441-448 of the Missouri Revised Statutes.

I. TENANCY BY THE ENTIRETY ("T/E")

A. Creation

1. Currently, no statutory provision defines a T/E or details the method of creating such a tenancy. However, case law provides: "The distinctive characteristic of an estate by the entirety is that it is deemed to be owned by a single entity, the marital community." *U.S. Fid. & Guar. Co. v. Hiles*, 670 S.W.2d 134, 137 (Mo. App. 1984).

2. A true T/E can only exists between a husband and wife. Note, however, there is case law which states that multiple trustees of a trust hold title by the entirety.

3. A conveyance to a man and woman, that are in fact married to each other, creates a rebuttable presumption of tenancy by the entirety. This presumption may only be rebutted by evidence that is strong enough to remove all doubt from the trial judge's mind that the property is held in a different form. This presumption arises even if the deed fails to state that the two are husband and wife. It is not necessary for the deed to recite "as tenants by the entirety," or to recite that the tenancy includes a right of survivorship.

4. A conveyance of property owned by husband *or* wife, or by husband *and* wife (other than as a T/E), made by husband and wife directly to themselves as husband and wife effectively creates a T/E. (§442.025, RSMo).

5. To create a T/E, the four unities must be observed:

    a. Unity of title – the estate is created by one instrument;

    b. Unity of interest – the interests of husband and wife must be of the same duration;

    c. Unity of time – the interests of husband and wife must vest at the same time; and

    d. Unity of possession – the interests of husband and wife must be of undivided possession.

6. Recitations in the deed that negate a T/E, e.g., to husband and wife, as tenants in common and not as tenants by the entirety, are effective.

7. Personal property may be held by husband and wife in a T/E.

B. Encumbrance

1. Neither spouse alone can convey any interest in entirety property. By parity of reasoning, no creditor of one spouse can reach T/E property to satisfy the separate debt of one spouse, with two limited exceptions: The IRS and the bankruptcy court, in certain limited instances, treat a T/E as though it was a joint tenancy, thereby allowing one-half to be taken for taxes or satisfaction of one spouse's debt.

2. Involuntary partition is not applicable to T/E property.

3. Spouses can convey T/E property free and clear of a judgment lien for the separate debt of the husband or the wife.

C. Severance

1. A T/E may be severed only by the joint action of husband and wife, e.g., a deed executed by husband and wife transferring the property to themselves, creating a tenancy in common, or to only one spouse. See *Jennings v. Atkinson*, 456 S.W.3d 461 (W.D. 2015).

2. A T/E is severed, or terminated:

   a. Upon the death of one spouse, leaving the survivor as sole owner;

   b. Upon divorce, with a resulting tenancy in common; or

   c. Upon execution by a creditor for a debt held by both the husband and the wife.

II. DEED OF TRUST ("D/T")

Although a mortgage is allowable under Missouri law, the simpler D/T is used in nearly every instance. If there is a default, a D/T allows for a less expensive procedure than foreclosure under a mortgage.

A. Form

1. There are three parties to a deed of trust:

   a. Debtor – the person or persons borrowing funds, whose real property serves as security for payment of the loan;

   b. Trustee – the person holding legal title to the real property on behalf of the lender; and

   c. Beneficiary – the lender of the funds.

2. If the Beneficiary sells or otherwise transfers the note secured by the D/T, then in addition to assignment of the note, an assignment should be recorded to show, of record, the new holder of the D/T.

3. If the note is paid in full and the Debtor so requests, a deed of release must be recorded to release the property from the lien; the trustee need not join in this release. (§443.060, RSMo). The Lender's failure to submit a sufficient deed of release for recording within 45 days will result in a penalty equal to the lesser of 10% of the debt or $300 per day for each day after the forty-fifth day, plus court costs and attorney fees. (§443.130, RSMo).

B. Foreclosure

1. In the event of default, the Beneficiary may instruct the Trustee to sell the real property to provide funds for payment of the debt balance plus the costs of foreclosure. Any excess funds derived from the sale are payable to the Debtor.

2. As with a mortgage, there are notice requirements, both personal and by publication, which must be observed. (§§443.310-.355, RSMo).

C. Death of Debtor

1. If the Debtor dies before payment of the debt in full, foreclosure is not allowed until 6 months after the Debtor's date of death. (§443.300, RSMo). This does *not* apply with respect to tenancy by the entirety property with respect to which both husband and wife are obligated - as the Debtor, now the surviving spouse, becomes the sole owner of the property.

2. The Beneficiary creditor may also file a claim in the Debtor's probate estate for the balance due.

III. THE RULE AGAINST PERPETUITIES AND RELATED RULES

The Rule Against Perpetuities and two related rules, the Rule Against Unreasonable Restraints on Alienation and the Rule Against Accumulations, historically arise most often in cases involving real property. These rules, however, apply to all types of property, both real and personal, and frequently are encountered in trust situations.

A. The Rule Against Perpetuities ("RAP")

1. Missouri caselaw has stated the RAP as follows:

"The Rule Against Perpetuities prohibits the granting of an estate which will not necessarily vest within a time limited by a life or lives in being and 21 years thereafter, together with the period of gestation necessary to cover cases of posthumous birth." *Cole v. Peters*, 3 S.W.3d 846, 851 (Mo. App. 1999).

2. Court decisions focus on the possibility factor, and courts will invalidate a restricted property transfer if there is the remotest possibility that the interest will not vest within the time constraints of the RAP.

3. **NOTE:** The RAP is concerned with *vesting* of title, not necessarily the actual transfer of the property title.

4. Missouri law (§442.555, RSMo) has slightly modified the RAP in regard to real property. The statute allows a court to reform a document that otherwise violates the RAP if "reformation would more closely approximate the [document's] primary purpose or scheme." This allows changing the terms of the document to eliminate violations of the RAP.

B. The Rule Against Unreasonable Restraints on Alienation ("RARA")

1. While the RAP is concerned with *vesting* of title, the RARA is concerned with suspension of the ability to *transfer* title, e.g., sell the real property.

2. The RARA generally voids any restriction that absolutely prevents the transfer of real estate in Missouri for a significant period of time.

3. The RARA serves many of the same purposes as the RAP, but it is less burdensome and academic than the RAP.

C. The Rule Against Accumulations ("RAA")

1. The RAA is concerned with accumulations of income, or conversely, with avoiding distribution of income to beneficiaries of the property.

2. The time limit on the ability to retain, or accumulate, income is the same as that for the RAP, set forth above.

NOTE: The RAP, the RARA and the RAA apply to all non-trust situations. These rules do not apply to employee pension plans (§§456.011-.014, RSMo) nor, more importantly, to trusts, which are governed by §456.025, RSMo. See the Trust Law Outline for a discussion of the statute applicable to trusts.

SIGNIFICANT MISSOURI LAW DISTINCTIONS

TORTS

I. VENUE AND JURISDICTION

A. Venue

1. Venue is determined as of the date that plaintiff is first injured. RSMo §508.010.9.

2. First Injury – First Injury is defined as the location where the trauma or exposure occurred, rather than where the symptoms are first manifested. RSMo §508.010.14.

3. Actions accruing in Missouri – proper venue is the county in which the action accrued. RSMo §508.010.4.

4. Actions accruing outside of Missouri:

   a. Individual Defendant – venue is proper where the individual defendant resides, **or** if plaintiff was a Missouri resident at the time s/he was first injured, the county that was plaintiff's principal residence. If any count alleges conduct in the course and scope of the defendant's employment with a corporation, the individual defendant's principal residence is deemed that of the employer corporation. RSMo §508.010.5(2).

   b. Corporate Defendant – the county where the corporation's registered agent is located **or,** if plaintiff was a Missouri resident at the time s/he was first injured, the county that was plaintiff's principal residence. RSMo §508.010.5(1).

   c. Multiple Defendants - in any county in which an individual defendant resides **or** a defendant corporation's registered agent resides.

5. Permissive joinder of separate claims cannot establish venue if, absent joinder, venue in that jurisdiction is not proper for each claim. *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W. 3d 168 (Mo. banc 2019); RSMo §507.040.

B. **Personal Jurisdiction** - The Supreme Court of Missouri curbed general personal jurisdiction over corporate defendants in *State ex rel. Norfolk Southern Railway Co. v. Dolan*, 512 S.W.3d 41 (Mo. banc 2017). The Court held that an out-of-state worker could only subject a non-resident defendant to personal jurisdiction if the corporation is incorporated in Missouri, has its principal place of business in the State, or in "exceptional cases" where the corporation is "essentially at home in the State, rather than merely "doing business."

II. DAMAGES

A. Punitive Damages

1. **Discovery** – Discovery is only permitted after the trial court makes an explicit finding that it is "more likely than not" that plaintiff can present a submissible punitive damages case. RSMo §510.263.8; See *State ex rel Rehnquist Design & Build, Inc. v. Siwak*, 499 S.W.3d 386 (Mo. App. 2016).

2. **Limits or Caps** – Punitive damages are limited to $500,000 or five times the net amount of the judgment rendered against the defendant, whichever is greater. RSMo §510.265.1. However, caps on punitive damages have been held to violate Missouri's constitutionally protected right to jury trial, as applied to actions that existed at common law. *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. banc 2014) (RSMo §510.265.1 found unconstitutional as applied to action for fraudulent misrepresentation).

B. Non-Economic Damages

1. Capped at $400,000 for causes of action against a health care provider for personal injury, and $700,000 for catastrophic personal injury and death, with upward adjustments for inflation. RSMo §538.210.

2. However, legislative caps on non-economic damages have been held to violate Missouri's constitutionally protected right to jury trial, as applied to actions that existed at common law. *Watts v. Lester E. Cox Medical Centers*, 376 W.W.3d 633 (Mo. banc 2012)(§538.210 found unconstitutional as applied to action for medical negligence.)

III. VICARIOUS LIABILITY

A. Parental Liability for Child(ren)

1. Parents or guardians of any unemancipated minor, under the age of eighteen, are statutorily liable for up to $2,000 in damages if the child:

   a. Purposefully "mark[s] upon, defac[es] or in any way damage[es] property." RSMo §537.045.1.

   b. Purposefully causes personal injury to any individual. RSMo §537.045.2.

2. A judge may order the parent, or guardian and/or minor to work for the owner of the property damaged or the person injured in lieu of payment under RSMo §537.045.3.

3. Generally, a parent will not be held liable for the torts committed by the parent's child. *Stronger ex rel. Stronger v. Riggs*, 21 S.W.3d 18 (Mo. App. W.D. 2000). However, a parent may be held liable for his child's actions where:

   a. the relationship of master and servant exists and the child is acting within the scope of his authority accorded by the parent;
   b. the parent is negligent in entrusting to the child an instrument which, because of its nature, use and purpose, is so dangerous as to constitute, in the hands of the child, an unreasonable risk to others;

c. the parent is negligent in entrusting to the child an instrumentality which, though not necessarily a dangerous thing of itself, is likely to be put to a dangerous use because of the known propensities of the child;

d. the parent's negligence consists entirely of his failure to reasonably restrain the child from vicious conduct imperiling others when the parent has knowledge of the child's propensity towards such conduct; or

e. the parent participates in the child's tortious act by consenting to it or ratifying it later and accepting the consequences.

B. Bar Owner or Tavernkeeper Liability

1. Missouri's dramshop statute provides that a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against a liquor licensee when it can be proven by clear and convincing evidence that the seller knew or should have known:

   a. That intoxicating liquor was served to a person under the age of 21 years old; or

   b. That intoxicating liquor was served to a "visibly intoxicated" person. RSMo §537.053.2.

2. "Visible intoxication" is defined as "significantly uncoordinated physical action or significant physical dysfunction." RSMo §537.053.3.

3. An individual's blood alcohol content is not prima facie evidence of visible intoxication. RSMo §537.053.3.

4. There is no social host liability.

C. Automobile Owner Liability for Driver – Missouri does not apply the "family car" or "permissive use" doctrines to impose liability on an automobile owner for the tortuous conduct of a driver.

IV. JOINT AND SEVERAL LIABILITY

A. 51% or Greater Liability – If a defendant is found to bear 51% or more of fault/liability, then the defendant is jointly and severally liable for the amount of the judgment rendered against all defendants. RSMo §537.067.1.

B. Less than 51% Liability – If a defendant is found to be less than 51% at fault, the defendant is only responsible for the percentage of the judgment assessed against the defendant, unless:

1. The other defendant was acting as an employee of the defendant; or

2. The defendant's liability arises out of a duty created by the Federal Employer's Liability Act. RSMo §537.067.1(2).

C. Punitive Damages - Joint liability does not apply to punitive damages. RSMo §537.067.2.

V. GOVERNMENTAL TORT IMMUNITY – STATE GOVERNMENT AND PUBLIC ENTITIES

A. **General Rule** - State of Missouri and other public entities are immune from tort liability under the sovereign immunity doctrine.

B. Exceptions - Sovereign immunity from tort claims is statutorily waived in two instances:

a. In cases where injuries arise from the negligent operation of a motor vehicle by a public employee within the course of his/her employment. RSMo §537.600.1(1); and

b. In cases where the injuries were caused by the dangerous condition of a public entity's property. RSMo §537.600.1(2).

C. Damages - Liability of the state and/or public entities is capped and/or limited as follows:

a. Liability is limited to $300,000 for any one person in a single accident or occurrence. RSMo §537.610.1.

b. Liability is limited to two million dollars for all claims arising out of a single accident or occurrence. RSMo §537.610.1.

c. These statutory limits on awards for liability are calculated and can be increased or decreased on an annual basis by the Director of Insurance. RSMo §537.610.5.

d. No award for tort damages against a public entity can include punitive or exemplary damages. RSMo §537.610.3.

VI. NEGLIGENCE – STANDARD OF CARE

A. Standard of Care for Medical Professionals - A national standard of care is applied to medical professionals. *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. banc 1972)(Missouri Supreme Court abandoned the locality rule in favor of a national standard of care).

B. Standard of Care Owed by Owners/Occupiers of Land – The duty of care owed by the owners/occupiers of land is determined by whether the plaintiff is a trespasser, licensee or invitee; however, the significance of the status becomes less important once the presence of the visitor becomes known, and a uniform duty, that of reasonable care, is owed to each while on the premises. *Penberthy v. Penberthy*, 505 S.W.2d 122 (Mo. App. E.D. 1973).

C. Violation of a Statute or Ordinance – Violation of an ordinance or statute is negligence *per se* where the person injured is within the class of persons intended to be protected by the ordinance, the injury is the type it was designed to prevent, and the violation is the

proximate cause of the injury. *McKinney v. H.M.K.G. & C.*, 123 S.W.3d 274 (Mo. App. W.D. 2003).

VI. COMPARATIVE FAULT

A. Missouri is a pure comparative negligence or fault state. The fault of plaintiff will reduce plaintiff's damages, but will not completely bar recovery. The last clear chance doctrine does not apply. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo. banc 1983); RSMo §537.765.

B. Defendant has the burden of pleading and proving by substantial evidence a prima facie case of fault on the part of the plaintiff in order for a comparative fault instruction to be submitted to the jury. *Herrington v. Medevac Med. Response*, 438 S.W.3d 417 (Mo. App. 2014).

C. A plaintiff's failure to wear a safety belt is admissible evidence of comparative negligence or fault in actions arising out of the design, construction, manufacture, distribution, or sale of a motor vehicle. RSMo §307.178.5 (effective January 1, 2020).

VII. MEDICAL MALPRACTICE CLAIMS

A. **Venue** – In medical malpractice tort actions, the plaintiff is considered "injured" only in the county where the plaintiff first received treatment by a defendant for the medical condition at issue. RSMo §538.232.

B. **Affidavit of Merit** – RSMo §538.225

1. The submission of an Affidavit of Merit is required in all medical malpractice action. The trial court is required to dismiss any medical malpractice claim wherein a claimant fails to file an affidavit stating that s/he has obtained a written opinion of a "legally qualified health care provider" stating that the defendant failed to use "reasonable care" and thereby caused plaintiff's claimed damages. *Hink v. Helfrich*, 545 S.W.3d 335 (Mo. banc 2018)(affirming the constitutional validity of the affidavit requirement)

2. A "legally qualified health provider" is defined as a health care provider licensed in Missouri or any other state in the same profession as the defendant and either actively practicing or within five years of retirement from actively practicing substantially the same specialty as the defendant. RSMo §538.225.2.

3. A separate affidavit must be filed for each defendant named in the petition. RSMo §538.225.4.

4. If plaintiff failed to timely file the Affidavit of Merit, upon motion of any party, the court must dismiss the action against plaintiff without prejudice. RSMo §538.225.6.

C. **Benevolent Gestures** – Statements, writings or other benevolent gestures

expressing sympathy made to either the person injured or that person's family is prohibited from being admitted into evidence. Only statements of fault can be admitted. RSMo §538.229.1.

D. **Negligent Credentialing** – The Supreme Court of Missouri has recognized claims against hospitals for negligent credentialing of physicians. Plaintiffs must prove the hospital owed a duty to the patient, the duty was breached, and injury resulted from the breach. *Tharp v. St. Luke's Surgicenter-Lee's Summit, LLC*, 2019 WL925542 (Mo. banc February 26, 2019).

E. **Statute of Limitations for Minors** – Medical malpractice lawsuits filed on behalf of injured minors must be commenced within two (2) years after the minor's 18th birthday. RSMo §516.105.

F. **Service of process** - must be made within 180 days of filing the petition if the statute of limitations has expired, otherwise the court shall dismiss the action without prejudice, unless the plaintiff has previously taken a nonsuit, in which case the dismissal is with prejudice. RSMo §516.105.

VIII. PRODUCTS LIABILITY

A. **Innocent "Seller in the Stream of Commerce"** – Under Missouri's "innocent seller" statute, a seller of a defective product "whose liability is based solely on his status as a seller in the stream of commerce may be dismissed from a products liability" claim if another defendant, from whom total recovery may be had for plaintiff's claim, is properly before the court. RSMo §537.762.

B. **Joinder** – Claims arising out of separate incidences or purchases of the same product or service do not satisfy the general joinder rule that allows plaintiffs to join in one action for claims arising out of the same transactions/occurrences when there are common questions of law or fact. RSMo §507.040.1.

IX. WRONGFUL DEATH ACTIONS

A. Statute of Limitations

1. A wrongful death action accrues on the day of the death of the person for whose death suit can be instituted. *Gramlich v. Travelers Ins. Co.*, 640 S.W.2d 180 (Mo. App. 1982).

2. There is a three year statue of limitations for all wrongful death claims. RSMo §537.100. The statute may be tolled as a result of fraudulent concealment of wrongdoing. *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015).

3. Section 537.100 applies to every wrongful death action. The statute of limitations for the underlying tort does not apply.

4. Service of process must be made within 180 days of filing the petition if the statute of limitations has expired, otherwise the court shall dismiss the action without prejudice, unless the plaintiff has previously taken a nonsuit, in which case the dismissal is with prejudice. RSMo §537.100.2.

B. Who May Sue

1. RSMo §537.080 delineates who may sue in a wrongful death action. The classes of plaintiffs are as follows:

    a. Class One: The spouse or children, or the surviving lineal descendants of any deceased children, whether the child is natural or adopted, legitimate or illegitimate, or the father or mother of the deceased, whether natural or adoptive.

    b. Class Two: If there are no persons in Class One entitled to bring the wrongful death action, then the brother or sister of the deceased, or their descendants, who can establish his or her right to those damages set forth in §537.090 because of the death.

    c. Class Three: If there are no persons in Class One or Two entitled to bring the wrongful death actions, then a plaintiff ad litem may file suit. The plaintiff ad litem shall be appointed by the court having jurisdiction over the action.

2. Only one wrongful death action may be brought against a defendant for the death of any one person.

3. A lower class member cannot file a wrongful death action if a higher class member survives and can file suit. *State ex rel. Griffin v. Belt*, 941 S.W.2d 570, 572 (Mo. App. 1997).

4. Where two or more may assert a cause of action for wrongful death, it is not necessary for a plaintiff to join all other permissible plaintiffs as long as the plaintiff has made a diligent effort to notify all parties with a cause of action. RSMo §537.095.1.

C. Damages

1. Factors to be considered by the jury when determining damages in wrongful death cases governed by RSMo §537.090.

2. Legislative caps and limitations on damages apply to wrongful death cases as such causes of action did not exist at common law in Missouri, and, therefore, the legislature may establish the contours of the substantive right to recover created by the statute. *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. banc 2016).

3. RSMo §538.210 caps non-economic damages for death at $700,000. Punitive damages are limited to $500,000 or five times the net amount of the judgment rendered against the defendant, whichever is greater. RSMo §510.265.1.

X. PREJUDGMENT INTEREST & DEMAND LETTERS – RSMo §408.040

A. A plaintiff may receive prejudgment interest if s/he has made a demand for

payment of the claim or an offer of settlement of a claim to the party(ies) or their representative(s) and to such party's liability insurer if known to claimant, if the amount of the judgment or order exceeds the demand for payment or offer of settlement.

B. In order to qualify as a demand or offer, the demand must:

1. Be written;

2. Sent by certified mail;

3. Be accompanied by an affidavit of the claimant describing the damages, including, the nature of the claim, the nature of any injuries claimed and a general computation of any category of damages sought by the claimant with supporting documentation, if any is reasonably available;

4. For wrongful death, personal injury and bodily injury claims, "be accompanied by a list of the names and addresses of medical providers who have provided treatment to claimant or decedent for such injuries, copies of all reasonably available damages for loss of wages or earnings, and written authorizations sufficient to allow the party, its representative and liability insurer if known to the claimant to obtain records from all employers and medical providers;"

5. Reference §408.040; and

6. Remain open for at least 90 days.

C. If the demand or offer is not accepted, the claimant must file cause of action in the circuit court within 120 days of the date the demand or offer was received, unless the parties agree in writing to a longer period of time. RSMo §408.040.2.

D. If the claimant fails to file a lawsuit within 120 days after the demand was received by the respondent, then s/he cannot receive prejudgment interest. RSMo §408.040.2.

XI. EMPLOYMENT DISCRIMINATION CLAIMS UNDER MISSOURI HUMAN RIGHTS ACT

A. Employee/Employer Defined

1. Whether an individual is an employee for purposes of holding employer liable for its tortious acts is reviewed under the common meaning of the word "employee." *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo banc 2011).

2. One who exercises control over the means and manner of the worker is an employer. *State ex rel. Sir v. Gateway Taxi Management Co.*, 400 S.W.3d 478 (Mo. App. 2013).

3. An independent contractor is "one who contracts to perform work according to his own methods without being subject to the control of his employer except as to

the result of his work." *State ex rel. MW Builders, Inc. v. Midkiff*, 222 S.W.3d 267, 270 (Mo. banc 2007).

B. Venue

MHRA venue provision provides that venue is proper in any circuit court in any county in which an unlawful discriminatory practice is alleged to have occurred, and the provision is to be interpreted liberally. *State ex rel. Hollins v. Pritchett*, 395 S.W.3d 600 (Mo. App. 2013).

C. Discriminatory Intent

Any alleged discrimination in employment must be "the motivating factor" to prove discrimination. RSMo §213.010(2) and (19).

D. Defendants

Plaintiffs may sue their employer but may not sue any individual employees who carried out the discrimination. RSMo §213.010(8)(c).

E. Damages

Damages are capped by the size of the employer. For companies with between 5 and 100, employees may recover just $50,000, plus interest and back pay. RSMo §213.111.

XII. EMPLOYMENT ARBITRATION AGREEMENTS

A. Where employer seeks to compel arbitration of an employment dispute based on an agreement signed by employee, the court must determine whether an arbitration contract exists; whether the dispute is covered by the contract; and whether the contract is subject to revocation under contract principles. *Clemmons v. Kansas City Chiefs Football Club, Inc.*, 397 S.W.3d 503 (Mo. App. 2013).

B. Arbitration agreements will not be enforced where there is no consideration; i.e., no mutual promise to arbitrate; continued at-will employment is not sufficient consideration; or employment at-will relationship already exists at the time the arbitration agreement is signed. *Sniezek v. Kansas City Chiefs Football Club, Inc.*, 402 S.W.3d 580 (Mo. App. 2013).

SIGNIFICANT MISSOURI LAW DISTINCTIONS

TRUST ACCOUNT MANAGEMENT

I. MISSOURI RULES OF PROFESSIONAL CONDUCT

A. Rule 4-1.15. Safekeeping Property and IOLTA Account

1. A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances.

2. Co-mingling of a lawyer's funds and a client's funds is not permitted. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying financial institution service charges on that account, and only in an amount necessary for that purpose.

   Client funds should only be in a client trust account, and never in any other account and should be withdrawn as soon as fees are earned, expenses paid, and the client has been billed or otherwise had an opportunity to dispute or agree to the disbursement. Attorney funds that are part of one instrument that also includes client funds should be deposited intact and then transferred out when appropriate (i.e. no "split deposit").

   Effective January 1, 2019, advanced flat fees which do not exceed $2,000 are exempt from this requirement and may be deposited into another account, such as the office operating account. However, if the attorney-client relationship is terminated prior to the advanced flat fee being earned then any unearned portion of the advanced fee shall be refunded.

3. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order.

4. Interest on Lawyers Trust Accounts (IOLTA) is a unique and innovative way to increase access to justice for individuals and families living in poverty and to improve our justice system. Without taxing the public, and at no cost to lawyers or their clients, interest from lawyer trust accounts is pooled to provide civil legal aid to the poor and support improvements to the justice system.

5. Pursuant to Rule 4-1.15(a)(2), any overdraft of a client's trust account will be reported to the Office of Chief Disciplinary Counsel.

B. Rule 4-1.15 Client Trust Account

1. A "Client Trust Account" holds funds on behalf of a client or third person.

2. Rule 4-1.15(a) requires that a client trust account have a special title and is designated as such. Some examples are: "Attorney Trust Account" or "Attorney Escrow Account" or "Clients' Funds Account"

3. Withdrawals or transfers from the Client Trust Account can be made on demand, subject only to any notice period that the financial institution is required to observe by law or regulation.

4. A Client Trust Account shall be either IOLTA, non-IOLTA, or an exempt trust account. Rule 4-1.155 establishes factors for determining when a lawyer should place client and third party funds in a Non-IOLTA trust account: e.g. expected amount of interest to be earned (duration, deposit amount and rate), costs of establishing a separate account, capacity to calculate interest owed each payee, and other circumstance affecting ability to earn income in excess of costs of a separate account.

C. Rule 4-1.15 Role of a Lawyer with Client Trust Account

1. Only a lawyer admitted to the practice of law in Missouri or a person under the direct supervision of the lawyer shall be the authorized signatory or can authorize electronic transfers from a client trust account. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds.

2. Receipts shall be deposited intact which means that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

3. A lawyer must wait a reasonable period of time for deposited funds to be collected by the financial institution in which the trust account is located before disbursing funds on that deposit. This is often referred to as the deposit being *"good funds."* It is not sufficient to wait only until the deposit is "cleared" or "available" according to financial institution records. In either of those situations, the transaction may be reversed by the financial institution if a problem arises. The amount of time that is reasonable to wait may vary from one financial institution to another, depending on the financial institution's processing method. Waiting 10 days after the date the bank records the deposit is presumed to be a reasonable period, unless a lawyer has actual notice of a reason to wait longer on a specific deposit. A shorter period may be reasonable, in some circumstances. A lawyer must also delay disbursement and take extra measures to ensure collection before disbursement if the lawyer is aware of information that causes doubt about the collection or collectability of the deposit.

4. Withdrawals from a trust account shall be made only by check payable to the named payee, not to cash or by authorized electronic transfer.

D. Rule 4 -1.15 Reconciliation of Client Trust Account

1. Reconciliation of the client trust account shall be performed in a reasonably prompt time each time an official statement from the financial institution is provided or available.

2. A lawyer may only deposit his or her own funds in a client trust account for the purpose of paying bank service charges and only in the amount necessary for that purpose.

3. Funds belonging to the lawyer, except funds deposited to pay bank service charges, must be disbursed to the lawyer reasonably promptly after the fee is earned or the expense paid and the client: has been billed; has had an opportunity to dispute the disbursement; or otherwise has agreed to the disbursement. Disbursement within a period of one month shall be presumed to be reasonably prompt.

4. Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account, and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

E. Rule 4-1.15 Recordkeeping for Client Trust Accounts

1. <u>At a minimum</u>, a lawyer shall maintain the following records associated with a client trust account.

    a. Receipts and Disbursement Journals for client trust accounts with all deposits and withdrawals;

    b. Records which identify the date, source and description of each item deposited, as well as the date, payee and purpose of each disbursement;

    c. Fee agreements, engagement letters, retainer agreements and compensation agreements with clients;

    d. Accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

    e. Bills for legal fees and expenses rendered to clients;

    f. Disbursements on behalf of clients;

    g. Checkbook registers, bank statements, records of deposits, pre-numbered canceled checks provided by a financial institution (physical or electronic version);

h. All electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and time the transfer was completed;

i. Reconciliations of the client trust accounts maintained by the lawyer;

j. Portions of client files that are reasonably related to client trust account transactions; and

k. Credit card transactions with clients, to the extent permitted by law and the payment card industry data security standard.

2. A lawyer shall also maintain Ledger Records for all client trust accounts showing for each separate trust client or beneficiary:

a. The source of all funds deposited; names of persons for whom funds are or were held; account of such funds; descriptions and amounts of charges and withdrawals and names of all person or entities to whom such funds were disbursed.

F. Rule 4-1.15 Maintenance of Client Trust Account Records

1. If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential. If a lawyer uses third-party electronic or internet based file storage, the lawyer must make reasonable efforts to ensure that the company has in place, or will establish reasonable procedures, to protect the confidentiality of client information. And, by reference to Rule 4-1.22 and Formal Opinion 127, records held electronically must be accessible, in the sense that the attorney must maintain a system that can access the stored data.

2. **Six Year Rule:** The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks must be maintained for a period of six years after termination of each legal engagement or representation. See Rule 4-1.15(f) for complete list of items which must be retained by an attorney.

It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for six years.

3. **Additional Documentation**: In some situations, documentation in addition to that specified in this Rule 4-1.15 is necessary for a complete understanding of a trust account transaction. The type of document that a lawyer must retain because it is “reasonably related” to a client trust account transaction will vary depending on the nature of the transaction and the significance of the document in shedding light on the transaction.

Examples of documents that typically must be retained include:

a. correspondence between the client and lawyer relating to a disagreement over fees or costs, or the distribution of proceeds,

b. settlement agreements contemplating payment of funds or settlement statements issued to the client,

c. documentation relating to sharing litigation costs and attorney fees for subrogated claims; and

d. agreements for division of fees between lawyers.

G. Missouri Supreme Court Decisions

1. An attorney's conduct in commingling personal funds and client funds in his trust accounts, making premature withdrawals from the trust accounts for earned fees, making cash withdrawals from his trust accounts, and failing to keep complete and accurate trust account records violated the rule of professional conduct that prohibited engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, since attorney's misuse of trust accounts included misappropriation of client funds (2017).

SIGNIFICANT MISSOURI LAW DISTINCTIONS

TRUST LAW

The primary source of Missouri law governing express trusts is the Missouri Uniform Trust Code ("MUTC"), §§456.1-101 to 456.11-1106, RSMo. Although the MUTC only became effective on January 1, 2005, it nonetheless applies, with few exceptions, to all express trusts "created before, on, or after January 1, 2005." §456.11-1106, RSMo. For the most part, the MUTC follows the Uniform Trust Code, but there are several significant variations. In addition, several statutes in place prior to enactment of the MUTC were retained because they address specific matters not addressed by the MUTC, and legislation enacted after 2005 created additional significant variations, such as qualified spousal trusts and health savings account trusts.

I. MISSOURI-SPECIFIC TRUST STATUTES (§§456.001-456.950)

A. Life Insurance Trust (§456.005)

1. Designation of trust or trustee as beneficiary of life insurance creates valid express trust even though beneficiary designation is revocable.

2. The trust agreement must be in writing and in existence "on the date of death of the insured," i.e., written trust agreement not required at time beneficiary designation is made.

B. Employee Trust (§§456.011-456.017)

1. Trust created as part of a stock bonus plan, nonpublic pension plan, disability or death plan, profit-sharing plan or retirement plan is not subject to rule against perpetuities.

2. The assets and income are not subject to assignment (spendthrift) and are exempt from attachment or execution prior to payment to the employee. (§456.014)

C. Addition to Trust (§456.021)

1. Allows transfer of property to the trust, by name. Common law required transfer be made to trustee.

2. Trust need not be in existence, i.e., transfer may be to trust "to be established."

D. The Rule Against Perpetuities and Related Rules (§456.025)

NOTE: The rules discussed in this subsection apply to a "trust" as defined in §456.025.4. The statute also contains a listing of trusts specifically not included.

1. The Rule Against Perpetuities ("RAP") (§456.025.1)

   a. Defined: "The Rule Against Perpetuities prohibits the granting of an estate which will not necessarily vest within a time limited by a life or lives in being and 21 years thereafter, together with the period of

gestation necessary to cover cases of posthumous birth." *Cole v. Peters*, 3 S.W.3d 846, 851 (Mo.App. W.D. 1999).

b. The RAP does not apply to a "trust" if the trustee, or another person delegated the power, has the power to sell the property, *and* the power to sell is effective no later than the date the RAP would have expired if it applied.

2. The Rule Against Unreasonable Restraints on Alienation ("RARA") (§456.025.1)

a. The RARA applies the same time limitation as the RAP.

b. As with the RAP, the RARA does not apply to a "trust" if the trustee, or another person delegated the power, has the power to sell the property *and* the power to sell is effective no later than the date the RAP would have expired if it applied.

3. The Rule Against Accumulations ("RAA") (§456.025.2)

a. The RAA applies the same time limit as the RAP.

b. The RAA does not apply to a "trust" unless the terms "require" income be accumulated, i.e., no distributions to beneficiaries, beyond the RAP time limitation.

c. Further, if the "trust" does require accumulations beyond the RAP period, the "trust" is not void, but rather the trustee "shall" nonetheless have the discretionary power to make distributions in accordance with the settlor's manifested intention for distribution.

5. The provisions of §456.025 apply to "trust" executed, amended or created on or after August 28, 2001.

NOTA BENE: The provisions of §456.025 apply only to trusts as defined in §456.025.4. **See the Real Property outline for a discussion of the RAP, the RARA and the RAA statute and rules applicable in non-trust situations and to trusts not governed by §456.025.**

E. Registration of Trust (§§456.027-456.033)

1. Allows trust to be registered in probate division of county where principal place of administration is located. (§456.027) Such registration, if proper, confers jurisdiction upon the court where registered and upon beneficiaries of the trust. (§456.033.1-.3)

2. Allows court to conduct proceedings involving the administration of the trust; broad jurisdiction. (§456.033.4)

F. Qualified Spousal Trusts (§456.950)

1. Married individuals may create a qualified spousal trust and both jointly and separately owned property transferred into the trust will be treated as if held as tenants by the entirety. Property held in a qualified spousal trust is immune from claims by creditors of an individual spouse, even though the trust is revocable. (§456.950.3)

2. The trust may provide for division of trust estate into (i) two separate shares with one share controlled by each spouse, and (ii) into three separate shares with one separate share controlled by both spouses, and the two remaining shares each controlled by one spouse. NOTE: *In re Brewer*, 544 B.R. 177 (Bankr. W.D. Mo. 2015)(Bankruptcy court found that married couple's tenancy by the entireties property transferred to a QST was severed because the settlor's right to partition the trust was inconsistent with common law tenancy by the entireties).

3. Creditor protection ceases upon dissolution of the marriage. (§456.950.3)

G. Health Savings Account Trusts (§456.006)

1. Where a trust or custodial account constitutes a health savings account, as defined under federal law (26 U.S.C Section 223(c)(1)), a trust may be created and moneys transferred from the HSA to the trustee or custodian. (§456.006.1)

2. The trust shall be deemed to have been established on the first day on which the individual who is the beneficiary is an eligible individual, as defined under federal law, in that calendar year in which the trust account is created under the statute. (§456.006.2)

II. MUTC – VARIATIONS FROM UNIFORM TRUST CODE

A. General Provisions

1. Definitions (§456.1-103) – Adds several definitions not in Uniform Trust Code and alters other definitions to comport with other Missouri statutes.

2. Default and Mandatory Rules (§456.1-105)

   a. Authority of court to modify or terminate a trust may be overridden by terms of the trust agreement. (§456.1-105.1(4))

   b. Deletes "qualified beneficiary" and adds "permissible distributee" as one to receive notice of irrevocable trust being established, and changes age of notice from 25 to 21. (§456.1-105.1(8)) Also adds provision allowing settlor to designate a permissible distributee to receive notices on behalf of other permissible distributees who are ancestors or descendants of the designated permissible trustee. (§456.1-105.3)

   c. Changes beneficiaries entitled to receive information upon request from all beneficiaries to "qualified beneficiaries." (§456.1-105.1(9))

3. Allows principal place of administration to be changed, but requires the place selected be appropriate to trust purposes, administration and interest of beneficiaries. (§456.1-108.2)

4. Allows intervention of attorney general in administration of a charitable trust if the trust is not for the benefit of a specified charity or charities. (§456.1-110.2(1))

5. Interested parties may enter into a binding nonjudical settlement agreement with respect to a matter involving a trust, subject to court approval, except such agreements may not be used to modify or terminate a trust for reasons that a court could terminate or modify a trust pursuant to §456.4-411B.1 (§456.1-111.6)

6. Provides trust provisions in favor of spouse are of no effect if marriage terminated or annulled. (§456.1-112)

B. Judicial Proceedings

1. Restates provisions set forth in §456.033.4 regarding matters subject to jurisdiction of court via registration (See I. E., *supra*) and adds additional matters. (§456.2-202)

2. Replaces venue rules with provisions similar to those set forth in repealed §456.450. (§456.2-204)

C. Representation of Another Person (§§456.3-301-456.3-305)

1. Allows a person to represent and bind another person if the representative and the person represented (i) have substantially identical interests and (ii) there is no conflict of interest between them, **unless**:

   a. The person represented objects before the representation becomes effective; or

   b. The court determines the representation might be inadequate. (§§456.3-301, 456.3-304 & 456.3-305)

2. The person represented may not object to representation by another in three instances:

   a. The holder of a testamentary power of appointment may represent and bind those persons whose interest is subject to the power. (§456.3-301.2(1))

   b. A conservator, conservator ad litem or guardian can represent and bind a totally disabled individual. (§456.3-301.2(2))

   c. A parent may represent and bind a minor or unborn child. (§456.3-301.2(3))

3. Subject to the above limits, the trustee of a trust may represent and bind beneficiaries of the trust.

4. The court may appoint a representative if it determines an interest is not represented or representation is inadequate.

D. Creation, Validity, Modification and Termination

1. Requires trust involving "lands, tenements or hereditaments" be in writing. (§456.4-407) Deletes prior law provision requiring assignment of a beneficiary's interest in trust be in writing.

2. Replaces Uniform Trust Code provision for modifying or terminating noncharitable irrevocable trusts with two sections:

   a. Allows nonjudicial modification or termination if settlor and all beneficiaries consent, even if contrary to a material purpose of trust. (§456.4-411A)

   b. Allows judicial modification or termination if all adult, competent beneficiaries consent and court determines any non-consenting beneficiary "will be adequately protected." (§456.4-411B). NOTE: This replaces §456.590, which was repealed in 2016.

3. Allows a Trustee who has discretionary power to make a distribution of income or principal, whether or not limited to an ascertainable standard, to one or more beneficiaries of a trust, the "first trust," to instead exercise the power by appointing all or part of the income or principal subject to the power in favor of a trustee of a "second trust," created under either the same or a different trust instrument. (§456.4-419.1)

   a. The second trust may have as beneficiaries only one or more of those beneficiaries of the first trust to or for whom a discretionary distribution may be made. (§456.4-419.2(1))

   b. The trustee remains subject to all fiduciary duties imposed by the trust instrument and Missouri law in exercising this power. (§456.4-419.4)

E. Creditor's Claims, Spendthrift and Discretionary Trusts (§456.5-501-456.5-508)

1. Throughout, the Uniform Trust Code has been modified to carry forward various provisions of prior Missouri law established under repealed §456.080.

2. Provides a beneficiary's interest in an irrevocable trust which is subject to the trustee's discretion is not an interest in property or an enforceable right.

   a. Creditor cannot compel distribution or by any other means obtain an interest in the trust assets even if:

      (i) distributions are governed by a standard;

(ii) beneficiary is serving as trustee or co-trustee;

(iii) trustee has abused his, her or its discretion; or

(iv) trust does not contain a spendthrift provision. (§456.5-504)

Creditor can, however, reach a mandatory distribution. (§456.5-506)

b. Inability of creditor to reach trust still applies even as to the settlor/beneficiary if settlor holds a testamentary power of appointment exercisable in favor of anyone other than (i) settlor, (ii) settlor's estate, (iii) settlor's creditors, or (iv) creditors of settlor's estate. (§456.5-505.3)

3. Except as provided under the Missouri Uniform Powers of Appointment Act, appointive property subject to a nongeneral power of appointment, or general power of appointment exercisable only at the powerholder's death, is not subject to creditors' claims. (§456.5-508)

4. Allows publication of notice after settlor's death to bar creditor claims after 6 months. (§456.5-505.5)

F. Revocable Trusts

1. Capacity required to create, amend or revoke trust, or add property to trust, is same as that required to make will. (§456.6-601)

2. Unless trust terms expressly provide trust is irrevocable, it is revocable. This reverses presumption under prior law, and is, therefore, only effective for trust executed on or after January 1, 2005. (§456.6-602)

3. If trust provides a method for amending or revoking, method must be "substantially" followed. If no method is provided, then any method, including a will, which manifests clear and convincing evidence of intent will suffice. (§456.6-602.3)

4. Trust contest is barred upon earlier of (i) 2 years after death, (ii) 6 months after person is provided copy of trust *and* notice identifying trustee and advising of 6 month limit, or (iii) upon expiration of will contest time, if the will is pourover *and* copy of trust is filed in probate division within 90 days of the first publication of notice of granting letters on the estate. (§456.6-604)

G. Office of Trustee

1. If trustee ceases or fails to serve and no successor is named, *majority in number* of qualified beneficiaries may appoint successor. (§456.7-704.3)

2. Allows removal and replacement of trustee if level of services by trustee "substantially and materially reduced." (§456.7-706.2(4))

H. Duties and Powers of Trustee

1. A trust instrument may provide for appointment of a trust protector who is given any powers over the trust as expressly granted in the trust instrument. (§456.8-808.2)

    a. A trust protector is any person, group of persons, or entity, not then serving as a trustee, and not the settlor or a beneficiary, designated in a trust instrument to instruct or direct the trustee regarding the trust or expressly granted in the trust instrument one or more powers over the trust (e.g. investment advisors). (§456.1-103(30))

    b. A trust protector shall act in a fiduciary capacity to carry out the powers granted to the trust protector in the trust instrument, provided that the trust instrument may provide that the trust protector shall act in a nonfiduciary capacity. (§456.8-808.6(1))

    c. The trust protector shall have such duties to the beneficiaries, the Settlor, or the trust as set forth in the trust instrument.

    d. Unless the trust instrument expressly provides otherwise, the trust protector is not a trustee and is not liable or accountable as a trustee when performing or declining to perform the express powers given to the trust protector in the trust instrument, except with respect to powers the trust protector is granted to direct, consent to, or disapprove a trustee's actual or proposed investment decision, distribution decision, or other decision of the trustee required to be performed under applicable trust law in carrying out the duties of the trustee in administering the trust. (§456.8-808.7). The trustee is not subject to the Prudent Investor Act (§§469.900-469.913) when carrying out any written directions given to the trustee by the trust protector concerning actual or proposed investment decisions, nor is the trustee accountable under law or equity for acts or omissions of a trust protector, or liable for monitoring or executing the instructions from the trust protector. (§456.8-808.7; §456.8-808.8)

    e. A trust protector is not liable for the acts or omissions of any fiduciary or beneficiary under the trust instrument. (§456.8-808.6(1))

2. Duty to protect trust property does not extend to tangible personal property of a trust revocable by the settlor when the property is not in the possession and control of the trustee. (§456.8-809)

3. Trustee is required:

a. To provide a copy of the trust instrument to the beneficiary upon request, *if* the Settlor is incompetent or deceased. (§456.6-603 & §456.8-813.2(1))

b. To notify qualified beneficiaries of the trustee's name, address and telephone number within 120 days after accepting trusteeship. (§456.8-813.2(2))

c. To notify qualified beneficiaries of the trust's existence (and provide other specified information) within 120 days after trust becomes irrevocable. (§456.8-813.2(3))

NOTE: §456.8-813 only applies to trusts which become irrevocable on or after January 1, 2005. (§456.8-813.8)

4. Beneficiary who receives asset subject to confidentiality restriction is bound by the restriction. (§456.8-813.7) See **NOTE** above.

I. Liability of Trustee and Rights

1. Breach of trust action is barred more than one year after the later of (i) the date the beneficiary was sent report disclosing potential claim, or (ii) the date written notice was provided to the beneficiary of the time allowed for commencing a proceeding. (§456.10-1005.1)

2. If prior provision not applicable, then judicial proceeding must be commenced within 5 years after the earlier of (i) the trustee ceasing to serve, (ii) the termination of beneficiary's interest, or (iii) the termination of trust. (§456.10-1005.3)

NOTA BENE: With the exceptions set forth in §456.1-105.2, the provisions of the MUTC are default, i.e., only apply if not overridden by the trust instrument.